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TRANSCRIPT OF RECORD

Pat. 166 85794 U.S.C.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND, PETITIONER,

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 1, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 23, 1937.

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United States District Court

SOUTHERN DISTRICT OF NEW YORK.

At Law—L 56-369.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Plaintiff,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

Statement Under Rule XIII

This action was commenced on January 20, 1934, by the filing by plaintiff in the office of the Clerk of the District Court for the Southern District of New York of a praecipe and the issuing of a summons from said Court to defendant.

The plaintiff named in the complaint was George S. Van Schaick, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York. By order of Hon. Henry W. Goddard, United States District Judge for the Southern District of New York, dated and filed October 16, 1935, the name of plaintiff was changed to Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York. There has been no other change in the names of the parties.

Statement Under Rule XIII

The summons and the complaint were served personally upon defendant on January 22, 1934, and were filed on January 23, 1934. Defendant's time to answer the complaint was extended from time to time to and including July 3, 1934, and on that day the answer was served upon the attorney for plaintiff and filed. On July 23, 1934, defendant served an amended answer upon the attorney for plaintiff and filed the same on July 24, 1934. By stipulation of the attorneys for the respective parties, dated April 24, 1936 and filed April 28, 1936, and by order of Hon. John C. Knox, United States District Judge for the Southern District of New York, dated April 27, 1936 and filed April 28, 1936, defendant was allowed to further amend its answer. The answer as so amended was served on April 24, 1936 and filed on April 28, 1936.

Upon plaintiff's motion and by order of the Court dated February 18, 1936 and filed February 19, 1936, the case was granted a preference and was placed on the day calendar of common law actions for trial at the March, 1936 Term of the Court.

On March 30, 1936, a stipulation in writing was signed by the attorneys for both parties hereto that a trial by jury be waived. Said stipulation was submitted to the Calendar Clerk of the United States District Court for the Southern District of New York on March 30, 1936 and was filed at the opening of the trial of the cause on June 22, 1936. An agreed statement of all the facts in the action was signed by the attorneys for both parties on March 30, 1936, and was filed at the opening of the trial on June 22, 1936.

Statement Under Rule XIII

The trial was held before Hon. Alfred C. Coxe on the 22nd day of June, 1936, without a jury, at a term of the District Court for the Southern District of New York for the trial of actions at law.

The opinion of Hon. Alfred C. Coxe (No. 9931) was dated and filed July 9, 1936. On August 20, 1936, a final judgment (No. 36,396) was signed and entered herein in favor of plaintiff against defendant in the amount of $4,125.60.

There has been no change in the attorneys for defendant. By stipulation dated October 11, 1935 and filed October 17, 1935, Walter B. Herendeen, Esq., was substituted for Louis H. Pink, Esq., as attorney for plaintiff. By stipulation dated January 25, 1936 and filed January 30, 1936, Eugene M. Clennon, Esq., was substituted for said Walter B. Herendeen, Esq., as attorney for plaintiff. By stipulation dated October 2, 1936 and filed October 8, 1936, Alfred C. Bennett, Esq., was substituted for said Eugene M. Clennon, Esq., as attorney for plaintiff, and said Alfred C. Bennett, Esq., is the attorney of record for plaintiff on this appeal.

There has been no arrest or bail taken, or property attached or arrested in this action. No question was referred to a commissioner, master or referee.

Pursuant to a stipulation signed by the attorneys for both parties, dated August 5, 1936, and filed September 28, 1936, defendant's bill of exceptions was allowed by order of Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York, dated September 26, 1936 and filed September 28, 1936, and the bill of exceptions was filed September 28, 1936.

Defendant's petition for appeal, assignment of errors, undertaking on appeal and citation on ap-

10 *Summons*

peal were presented to Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York, on September 26, 1936, and the order allowing the appeal and the citation were signed on that day and the bond approved. All of the foregoing papers were filed on September 28, 1936, except the citation, which was served on the attorney for defendant on September 30, 1936 and filed October 2, 1936.

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Summons

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

L56—Page 369

GEORGE S. VAN SCHAICK, Superintendent of Insurance of the State of New York, as Liquidator of the SOUTHERN SURETY COMPANY OF NEW YORK,

12

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

To the Above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the

service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 20th day of January A. D. 1934.

CHARLES WEISER,
Clerk.

LOUIS H. PINK,
Plaintiff's Attorney,
Office and Post Office Address,
80 Centre Street,
Borough of Manhattan,
City of New York.

Complaint

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Plaintiff, by Louis H. Pink, his attorney, for his complaint herein, respectfully alleges:

First: That plaintiff is the Superintendent of Insurance of the State of New York and is a citizen of that State.

16 *Complaint*

Second: Upon information and belief, that heretofore and prior to April 1, 1930, the Southern Surety Company of New York was duly organized under and by virtue of the laws of the State of New York, and authorized, among other things, to do a surety and insurance business.

Third: That on the 22nd day of March, 1932 an order of the Supreme Court of the State of New York was duly made and entered in the office of the Clerk of the County of New York, wherein it was
17 ordered, adjudged and decreed that the Southern Surety Company of New York was insolvent.

Fourth: That in and by said order and pursuant to the provisions of the Insurance Law of the State of New York, plaintiff was directed to take possession of the property of the Southern Surety Company of New York and liquidate its business, and was vested with title to all the property, contracts, and rights of action belonging to the Southern Surety Company of New York.

Fifth: That plaintiff, as Superintendent of In-
18 surance of the State of New York, took possession of the property of the Southern Surety Company of New York and proceeded to liquidate the business thereof.

Sixth: Upon information and belief, that defendant is a corporation duly organized and existing under the laws of the State of Maryland.

Seventh: Upon information and belief, that heretofore and on or about December 12, 1930, the Southern Surety Company of New York duly exe-

cuted and delivered to John DeMartini Co., Inc. a policy of fidelity insurance wherein said Southern Surety Company of New York bound itself in an amount not exceeding the sum of Ten Thousand Dollars ($10,000) to said John DeMartini Co., Inc., to reimburse said John DeMartini Co., Inc. for any pecuniary loss sustained by it through any fraudulent or dishonest acts committed by any employee of said John DeMartini Co., Inc. during the term of said policy.

Eighth: Upon information and belief, that heretofore and while said policy of fidelity insurance was in full force and effect, one Marvin Goldblatt was employed by the said John DeMartini Co., Inc., and that said Marvin Goldblatt was one of the employees of John DeMartini Co., Inc. for whose fraudulent or dishonest acts the Southern Surety Company of New York bound itself, under its policy of fidelity insurance, to reimburse said John DeMartini Co., Inc.

Ninth: Upon information and belief, that heretofore and while said policy of fidelity insurance was in full force and effect, and at various times and dates between April 14, 1931, and October 22, 1931, said Marvin Goldblatt committed various fraudulent and dishonest acts, as the result of which said John DeMartini Co., Inc. sustained losses amounting to the sum of Seven Thousand Forty-Five and 41/100 Dollars ($7,045.41).

Tenth: Upon information and belief, that said John DeMartini Co., Inc. duly filed with the Southern Surety Company of New York proofs of loss concerning said fraudulent and dishonest acts

committed by said Marvin Goldblatt, and duly performed all the conditions of the policy of fidelity insurance delivered and executed by the said Southern Surety Company of New York to John DeMartini Co., Inc.

Eleventh: Upon information and belief, that by reason of the facts hereinabove set forth, the said Southern Surety Company of New York became and is liable to said John DeMartini Co., Inc., under said policy of fidelity insurance, in the
23 amount of Seven Thousand Forty-Five and 41/100 Dollars ($7,045.41); and that the said liability of the Southern Surety Company of New York has been determined and allowed in the liquidation proceedings thereof in said amount of Seven Thousand Forty-Five and 41/100 Dollars ($7,045.41).

Twelfth: Upon information and belief, that heretofore and on or about December 12, 1930, defendant, for a valuable consideration, agreed to reinsure the Southern Surety Company of New York and to indemnify it against liability incurred
24 by said Southern Surety Company of New York on the policy of fidelity insurance hereinabove set forth, issued by said Southern Surety Company of New York to John DeMartini Co., Inc., in the amount of one-half (½) of such liability, and not exceeding the sum of Five Thousand Dollars ($5,000).

Thirteenth: Upon information and belief, that said reinsurance by the defendant of the Southern Surety Company of New York on the policy of fidelity insurance issued to John DeMartini Co., Inc. was subject to the terms of a general reinsur-

25

ance contract entered into between the defendant and the Southern Surety Company of New York on or about the 1st day of April, 1930; that a copy of such general reinsurance contract is attached hereto, made a part hereof, and marked Exhibit A.

Fourteenth: Upon information and belief, that said reinsurance contract was in full force and effect at all times hereinabove mentioned, and that the Southern Surety Company of New York has duly performed all the conditions of such contract on its part.

26

Fifteenth: Upon information and belief, that by reason of the facts hereinabove set forth, the defendant became and is liable to the Southern Surety Company of New York, under said reinsurance contract, in the amount of Three Thousand Five Hundred Twenty-Two and 71/100 Dollars ($3,522.71).

Sixteenth: That the plaintiff, as Liquidator of the said Southern Surety Company of New York, has duly made demand of the defendant for payment of the said sum of Three Thousand Five Hundred Twenty-Two and 71/100 Dollars ($3,522.71), but no part thereof has been paid to said Southern Surety Company of New York or to the plaintiff as Liquidator thereof.

27

WHEREFORE, the plaintiff demands judgment of the defendant in the sum of Three Thousand Five Hundred Twenty-Two and 71/100 Dollars

28 *Complaint*

($3,522.71), with interest from November 17, 1933, and costs.

LOUIS H. PINK,
Attorney for Plaintiff,
Office & P. O. Address:
80 Centre Street,
New York, N. Y.

(Verification not printed)

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Exhibit A to the complaint, consisting of the "General Reinsurance Agreement" between Fidelity and Deposit Company of Maryland and Southern Surety Company of New York, to which is attached the Standard Form of Reinsurance Agreement adopted by the Surety Association of America on January 15, 1930, is printed *infra*, page 41, as Exhibit C to the Stipulation of Facts.

Answer

30

(Note: The original answer and first amended answer are not printed, another amended answer having been subsequently served and filed.)

Stipulation for Amendment of Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Plaintiff,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, through their respective counsel, that the defendant may file the amended answer attached hereto, and service of a copy thereof is hereby accepted.

Dated, April 24, 1936.

EUGENE M. CLENNON,
Attorney for Plaintiff.
By IRVIN WALDMAN,
Counsel.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

So Ordered: 4/27/36
JNO. C. KNOX,
U. S. D. J.

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Amended Answer

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Defendant, by Hughes, Schurman & Dwight, its attorneys, answering the complaint herein,

35 I. Denies on information and belief each and every allegation in paragraph "Twelfth" of said complaint except that defendant admits that heretofore and on or about December 12, 1930, defendant, for a valuable consideration, signed a memorandum, a copy of which is attached hereto, made a part hereof, and marked Exhibit A, which had theretofore been signed by Southern Surety Company of New York, and that the bond referred to in said memorandum was the policy referred to in said paragraph.

II. Denies on information and belief each and 36 every allegation contained in paragraph "Fourteenth" of said complaint except that defendant admits that the reinsurance contract herein admitted was in full force and effect at the times mentioned in said paragraph.

III. Denies on information and belief each and every allegation contained in paragraph "Fifteenth" of said complaint.

IV. Denies on information and belief each and every allegation contained in paragraph "Six-

teenth" of said complaint except that defendant admits that plaintiff, as Liquidator of Southern Surety Company of New York, demanded payment from defendant of $3,522.71, and that no part of said sum has been paid to said Southern Surety Company of New York or to the plaintiff as Liquidator thereof.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

V. No part of the liability referred to in paragraph "Eleventh" of said complaint has been paid, there has never been delivered to defendant proof of the payment of any part of the losses referred to in paragraph "Ninth" of said complaint, and there has never been given to defendant any written notice of any intention on the part of said Southern Surety Company of New York or the Liquidator thereof to pay all or any part of said losses. 38

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

VI. No part of the liability referred to in paragraph "Eleventh" of said complaint has been paid, and neither said Southern Surety Company of New York nor the Liquidator thereof has suffered any loss by reason of the facts set forth in the complaint. 39

FOR A PARTIAL DEFENCE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF.

VII. Defendant repeats and realleges each and every allegation in paragraph VI hereof with the same force and effect as if the same were herein set forth in full.

Amended Answer

VIII. The total liabilities of said Southern Surety Company of New York are, and since March 22, 1932, have been, substantially in excess of its total assets, and said company is insolvent and plaintiff as Liquidator thereof will not be able to pay the creditors thereof, including John DeMartini Co., Inc., with respect to its claim in the amount of $7,045.41 described in paragraphs "Seventh" and "Eleventh" of the complaint, in full even if he receives the full amount claimed herein and all other amounts to which he may claim to be entitled under other reinsurance agreements.

IX. Upon complete liquidation of said company and distribution of its assets John DeMartini Co., Inc. will receive no more than a liquidating dividend or dividends on its said claim in the same proportion and to the same extent as other general creditors of said company and any loss which said company or the Liquidator thereof may suffer by reason of the facts set forth in the complaint cannot exceed the amount of said liquidating dividend or dividends.

WHEREFORE defendant demands judgment dismissing the complaint together with the costs and disbursements of this action.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant,
Office and P. O. Address,
100 Broadway,
Borough of Manhattan,
New York, N. Y.

(Verification not printed)

Exhibit A to the amended answer is printed *infra*, page 48, as Exhibit D to the Stipulation of Facts.

Stipulation Waiving Jury Trial

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK, 44

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED between the parties to this cause that a jury trial shall be waived and that the case shall be tried before a Judge of this Court without the aid or intervention of a jury.

Dated, March 30, 1936.

45

EUGENE M. CLENNON,
Attorney for Plaintiff,
By IRVIN WALDMAN,
Counsel.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

46

Stipulation of Facts

(Note: The stipulation of facts is printed *infra*, page 18.)

Bill of Exceptions

[SAME TITLE]

47

BE IT REMEMBERED that, on June 22, 1936, the above entitled cause came on for trial upon the issues joined herein before the Honorable Alfred C. Coxe, sitting as a Judge of this Court, without a jury, a jury having been duly waived by the parties by a written stipulation which is as follows:

Stipulation Waiving Jury Trial

(Note: The stipulation waiving a jury trial is printed at page 15, *supra*.)

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The plaintiff, to sustain the issues on its part, filed the agreed statement of facts hereinafter set forth and, by stipulation of the parties, said agreed statement of facts and the exhibits attached thereto were filed and introduced into evidence in this cause with the same force and effect as if read into evidence.

Said agreed statement of facts was all of the evidence offered or introduced at the trial of this cause.

In the progress of the trial the Court made rulings, to each of which the defendant duly ex-

cepted at the time thereof, overruling and denying the following motions made by the defendant:

(1) Motion made at the close of the plaintiff's case, and renewed at the close of the whole case, to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for the plaintiff;

(2) Motion made at the close of the whole case to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for the plaintiff;

(3) Motion made at the close of the whole case for judgment for the defendant on all the grounds open to the defendant on the issues and pleadings.

With the consent of the parties, the Court made said agreed statement of facts its special findings of fact.

Said agreed statement of facts and said special findings are as follows:

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Stipulation of Facts

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, through their respective counsel, for the purpose of this
53 suit only, that the following facts shall be taken as true, subject and without prejudice to the right of either party to question the materiality or relevancy of any of such facts or any document herein referred to and to make any contention with respect to the legal effect thereof, further or better proof of which, however, shall not be required for the purpose of establishing the same.

1. Plaintiff is the Superintendent of Insurance of the State of New York and is a citizen of that State, and was substituted herein as plaintiff in place of George S. Van Schaick, his predecessor as
54 Superintendent of Insurance, who had commenced this action as Liquidator of Southern Surety Company of New York.

2. At all times herein mentioned up to March 22, 1932, Southern Surety Company of New York was duly organized under and by virtue of the laws of the State of New York, and authorized, among other things, to do a surety and insurance business.

3. On March 22, 1932, an order of the Supreme Court of the State of New York was duly made

and entered in the office of the Clerk of the County of New York, wherein it was ordered, adjudged and decreed that Southern Surety Company of New York was insolvent. A copy of said order is annexed hereto as Exhibit A and is hereby made a part hereof.

4. In and by said order and pursuant to the provisions of the Insurance Law of the State of New York, plaintiff's predecessor as Superintendent of Insurance was directed to take possession of the property of Southern Surety Company of New York and liquidate its business, and was vested with title to all the property, contracts and rights of action belonging to Southern Surety Company of New York.

5. Plaintiff's predecessor, as Superintendent of Insurance of the State of New York, took possession of the property of Southern Surety Company of New York and proceeded to liquidate the business thereof. On becoming Superintendent of Insurance plaintiff succeeded to all right, title and interest of his predecessor and took possession of said property, as Liquidator of Southern Surety Company of New York.

6 Defendant at all times herein mentioned was and is a corporation duly organized and existing under the laws of the State of Maryland and was authorized, among other things, to enter into and perform such agreements as are here involved.

7. On or about December 12, 1930, Southern Surety Company of New York duly executed and delivered to John DeMartini Co., Inc., a bond or

58 *Stipulation of Facts*

policy of fidelity insurance, a copy of which is annexed hereto as Exhibit B and is hereby made a part hereof, wherein Southern Surety Company of New York bound itself in an amount not exceeding the sum of Ten Thousand Dollars ($10,000) to John DeMartini Co., Inc., to reimburse John DeMartini Co., Inc., for any pecuniary loss sustained by it through any fraudulent or dishonest acts committed by any employee of John DeMartini Co., Inc., during the term of said bond or
59 policy.

8. While said bond or policy of fidelity insurance was in full force and effect, one Marvin Goldblatt was employed by John DeMartini Co., Inc., and said Marvin Goldblatt was one of the employees of John DeMartini Co., Inc. for whose fraudulent or dishonest acts Southern Surety Company of New York bound itself, under its policy of fidelity insurance, to reimburse John DeMartini Co., Inc.

9. While said bond or policy of fidelity insur-
60 ance was in full force and effect, and at various times and dates between April 14, 1931, and October 22, 1931, said Marvin Goldblatt committed various fraudulent and dishonest acts, as the result of which John DeMartini Co., Inc. sustained a loss amounting to the sum of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41).

10. John DeMartini Co., Inc. duly filed with Southern Surety Company of New York proofs of loss concerning said fraudulent and dishonest acts committed by said Marvin Goldblatt and duly performed all the conditions of the said bond or policy

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of fidelity insurance delivered and executed by Southern Surety Company of New York to John DeMartini Co., Inc., on its part to be performed.

11. By reason of the facts hereinabove set forth, Southern Surety Company of New York became and is liable to John DeMartini Co., Inc., under said bond or policy of fidelity insurance in the amount of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41); and said liability of Southern Surety Company of New York has been determined and allowed in the liquidation proceeding thereof in said amount of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41).

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12. At the time of the entry of the order of liquidation of Southern Surety Company of New York referred to in paragraph 3 hereof, the claim of John DeMartini Co., Inc. against Southern Surety Company of New York referred to in paragraph 11 hereof was in the process of examination and investigation by said company.

13. On or about April 1, 1930, Southern Surety Company of New York and defendant made an agreement, hereinafter referred to as the "general reinsurance agreement", a copy of which is annexed hereto as Exhibit C and is hereby made a part hereof. Thereafter and on or about December 12, 1930, Southern Surety Company of New York and defendant signed a memorandum, a copy of which is annexed hereto as Exhibit D and is hereby made a part hereof. The general reinsurance agreement referred to in said memorandum is the agreement referred to above as Exhibit C and the bond referred to in said memorandum is the bond

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64 *Stipulation of Facts*

or policy referred to in paragraph 7 hereof. Said memorandum and said general reinsurance agreement were in full force and effect at all times hereinabove mentioned.

14. Neither Southern Surety Company of New York nor the Liquidator thereof nor anyone else has paid any part of the liability of said company referred to in paragraph 11 hereof, or delivered to defendant proof of payment of any part of the loss referred to in paragraph 9 hereof, or given written
65 notice of intention to pay the loss in accordance with lines 74-76 of the standard form or reinsurance agreement included in and made a part of Exhibit C.

15. Prior to the commencement of this action, plaintiff demanded and now seeks payment from defendant in the sum of Three Thousand Five Hundred Twenty-two and 71/100 Dollars ($3,522.71) with interest from November 17, 1933, the date of the allowance of the claim of John DeMartini Co., Inc. by the Liquidator.

16. No part of the amount demanded by plain-
66 tiff has been paid by defendant.

17. Southern Surety Company of New York is now being administered by the Liquidator thereof and it appears from the books, records and documents and all property in his possession as Liquidator of Southern Surety Company of New York that the total liabilities thereof are, and since the institution of the liquidation proceedings have been, substantially in excess of the total assets, that the company is insolvent and that he will not be able to pay the creditors of Southern Surety

Company of New York, including John DeMartini Co., Inc., with respect to its claim in the amount of $7,045.41 referred to in paragraph 11 hereof, in full even if the Liquidator receives the full amount claimed herein and any other amounts to which he may claim to be entitled under other reinsurance agreements. 67

18. Upon complete liquidation of Southern Surety Company of New York and distribution of its assets, John DeMartini Co., Inc., will receive a liquidating dividend or dividends on its claim of $7,045.41 referred to in paragraph 11 hereof, in the same proportion and to the same extent as other general creditors of Southern Surety Company of New York. 68

19. Upon receipt at its home office of notice of the claim and loss of John DeMartini Co., Inc., herein referred to, Southern Surety Company of New York gave defendant at its home office prompt written notice thereof.

20. Southern Surety Company of New York and the Liquidator thereof duly performed all the terms, covenants and conditions of said reinsurance agreement on the part of said company to be performed, except as herein stated. 69

21. The documents served upon Southern Surety Company of New York by John DeMartini Co., Inc., relating to claims and losses under the policy, contract of insurance, or bond issued by Southern Surety Company of New York to John DeMartini Co., Inc., were and are proper and sufficient.

70 *Stipulation of Facts*

22. The proof of claim filed by John DeMartini Co., Inc., in the sum of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41), with the Superintendent of Insurance of the State of New York, as Liquidator of Southern Surety Company of New York, was proper and sufficient and the allowance, adjustment and admission thereof as a claim against the assets of the company in the sum of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41), was proper and valid.

71 23. The standard form of agreement referred to in paragraph 3 of the general reinsurance agreement (Exhibit C hereto) was adopted by the Surety Association of America on January 15, 1930, in place of a prior standard form which had been adopted by said association on May 12, 1915, a copy of which is annexed hereto as Exhibit E and is hereby made a part hereof.

Dated, March 30, 1936.

EUGENE M. CLENNON,
Attorney for Plaintiff,
72 By IRVIN WALDMAN,
Counsel.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

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Exhibit A

ORDER OF LIQUIDATION

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, in the Borough of Manhattan, City, County and State of New York, in the First Judicial District, on the 22nd day of March, 1932.

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Present:

HONORABLE JOHN FORD,
Justice

In the Matter of

the Application of the

PEOPLE OF THE STATE OF NEW YORK, by GEORGE S. VAN SCHAICK, Superintendent of Insurance of the State of New York, for an order to take possession of the property and liquidate the business

of the

75

SOUTHERN SURETY COMPANY OF NEW YORK.

Upon reading and filing the petition of George S. Van Schaick, Superintendent of Insurance of the State of New York, duly verified the 15th day of March, 1932, and the exhibit thereto annexed, made a part thereof and marked Exhibit A, and the

order to show cause thereon granted by Mr. Justice E. J. Glennon, one of the Justices of the Supreme Court of the State of New York, in the First Judicial District of the said State, on the 15th day of March, 1932, and upon proof of due service of the said order to show cause and the papers upon which it was granted upon the Southern Surety Company of New York, by affidavit of Joseph T. Moore, sworn to the 15th day of March, 1932, and upon reading and filing the affidavit of
77 George S. Van Schaick, Superintendent of Insurance of the State of New York, sworn to the 22nd day of March, 1932, and it appearing to my satisfaction that the Southern Surety Company of New York is a corporation organized under and by virtue of the laws of the State of New York, and particularly under Article II of the Insurance Law thereof; that the Southern Surety Company of New York was incorporated on or about the 27th day of June, 1928; that the said corporation has been transacting the business of insurance in the State of New York; that its principal office is located at 111 John Street, in the Borough of Manhattan, City, County and State of New York,
78 which is in the First Judicial District of the Supreme Court of the said State; that the aforesaid Southern Surety Company of New York is amenable to the Insurance Law of the State of New York and subject to the examination and supervision of the Superintendent of Insurance of the State of New York and the Insurance Department, and has been examined by an official examiner of the Insurance Department duly appointed for that purpose pursuant to law by the petitioner as Superintendent of Insurance, and said examiner, after such examination was duly

made, submitted to the petitioner and to the Insurance Department, pursuant to law, a sworn report of such examination of the Southern Surety Company of New York, and that the report of such examiner has been duly filed in the office of the State Department of Insurance and of the Superintendent of Insurance of the State of New York, and it appearing from the said report annexed to the petition and marked Exhibit A that the company is in possession of admitted assets in the sum of $5,396,918.50; that its liabilities, exclusive of capital stock, amount to $5,951,571.72, which is 80
$554,653.22 in excess of its admitted assets, without any provision for its capital stock liability of $750,000.00, making a total deficiency of admitted assets of $1,304,653.22; that the Southern Surety Company of New York is insolvent, and that it has been found upon examination to be in such condition that its further transaction of business will be hazardous to its policyholders, to its creditors and to the public, and that its continuance in the business of insurance would be contrary to public policy; that it should be dissolved and liquidated under and pursuant to the laws of the State of 81
New York, and particularly under the Insurance Law thereof; and it further appearing that the reason why the return of the order to show cause is desired upon less than the usual eight days' notice for service of such orders for notice of motion is because the statute requires the above-entitled proceeding to be instituted by an order to show cause and further because delay will be prejudicial to the policyholders, creditors, stockholders and the public, and because the said corporation is in a hazardous and precarious condi-

82 *Exhibit A*

tion; that no previous application for the order herein asked for or for any like order or similar relief has been made to any court or judge, and the motion on such order to show cause having duly and regularly come on before the court for hearing, and after hearing Honorable John J. Bennett, Jr., Attorney-General of the State of New York, Joseph G. Bill, Esquire, a Special Deputy Assistant Attorney-General, of counsel, representing the Superintendent of Insurance of the State of New York, in support of said motion, Daniel F.
83 Cohalan (Rolland R. Rasquin of Counsel, appearing for certain stockholders, but not opposing; and after a full hearing, and due deliberation having been had thereon, and upon filing the opinion of the court, it is hereby

ORDERED, ADJUDGED AND DECREED, that the petition of George S. Van Schaick, as Superintendent of Insurance of the State of New York, be and the same hereby is in all respects granted, and the said George S. Van Schaick and his successors in office as Superintendents of Insurance of the State of
84 New York be and he is and they are hereby authorized and directed forthwith to take possession of the property and liquidate the business of said Southern Surety Company of New York under and pursuant to the provisions of Article XI of the Insurance Law of the State of New York, and that said Superintendent of Insurance of the State of New York and his successors in office be and he is and they are hereby vested with title to all of the property, contracts and rights of action of the said corporation, and he is and they are hereby directed to deal with the property and business of said corporation in his and their own names as Superin-

tendents of Insurance of the State of New York, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the Southern Surety Company of New York is insolvent, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that formal notice of the making and entry of this order be given by the Superintendent of Insurance by publication and by mail as hereinafter directed, demanding that all persons indebted to the said corporation render accounts of their indebtedness and to pay any sums due to the liquidator or his successors in office, and to give notice to all stockholders, policyholders and creditors of said Southern Surety Company of New York and all persons having any unsatisfied claim or demand of any character against said Southern Surety Company of New York and a reasonable time and opportunity to file and present proofs of claim with the Superintendent of Insurance or his successors in office and to give notice that all claims presented will be determined and the assets distributed without further notice to persons failing to comply with the aforesaid liquidation notice, and such notice may contain such other rules and regulations as the Superintendent of Insurance or his successors in office may deem necessary and requisite for the purpose of this proceeding, and fixing and determining all lawful and valid debts, claims and demands of creditors, policyholders and stockholders of the said Southern Surety Company of New York, and it is hereby further

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ORDERED, ADJUDGED AND DECREED, that the notice aforesaid be given by publication in the Journal

88 *Exhibit A*

of Commerce and Commercial Bulletin commencing on the 28th day of March, 1932, and daily thereafter to the 4th day of April, 1932, and thereafter twice a week for three successive weeks, and on the 18th and 20th days of October, 1932, and by mail by mailing a copy of such notice securely enclosed in a postpaid wrapper addressed to each of the known persons who may have a claim against the Southern Surety Company of New York, at the last known address of such persons as the same may be disclosed by the records of the corporation
89 within ninety days after the entry of this order; and it is hereby further

ORDERED, ADJUDGED AND DECREED, that all persons who may have claims against the Southern Surety Company of New York be notified in the manner hereinabove prescribed to present the same to the Superintendent of Insurance, as liquidator, or his Special Deputy in charge of the liquidation, at a place specified in the said notice, within seven months from the date of the entry of this order, and not later than the 22nd day of October, 1932,
90 and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the notice hereinbefore prescribed is sufficient notice to all persons interested in the assets of the Southern Surety Company of New York, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that said Southern Surety Company of New York, its officers, directors, trustees, policyholders, servants, agents and employees, and all other persons having any property or records belonging to the said Southern

Surety Company of New York, are hereby directed to assign, transfer and deliver to said Superintendent of Insurance of the State of New York and his successors in office, all of such property in whosesoever name the same may be, and that any persons, firms, or corporations having any books, papers or records relating to the business of said Southern Surety Company of New York shall preserve the same and submit them to the Superintendent of Insurance of the State of New York and his successors in office, or his or their agents, for examination at all reasonable times, and it is 92 hereby further.

ORDERED, ADJUDGED AND DECREED, that the officers, directors, policyholders, trustees, agents, servants and employees of said Southern Surety Company of New York, and all other persons be and they hereby are enjoined and restrained from the further transaction of business or from dealing with or disposing of the property or assets of said corporation, or doing or permitting to be done any act or thing which might waste the assets or allow or suffer the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against 93 said corporation or its estate while in the possession and control of the Superintendent of Insurance, his successors in office, or while in liquidation, or at any other time, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the officers, directors, stockholders, policyholders, servants, agents, employees and creditors of said Southern Surety Company of New York, and all other persons, be and they are hereby enjoined and restrained from bringing or further prosecuting any

94 *Exhibit A*

action at law, suit in equity, special or other proceeding against said corporation or its estate, or the Superintendent of Insurance of the State of New York and his successors in office as liquidator thereof, or from making or executing any levy upon the property or estate of said corporation, or from in any way interfering with the Superintendent of Insurance of the State of New York or his successors in office, in his or their possession, control or management of the property of the said corporation, or in the discharge of his or their
95 duties as liquidators thereof, or in the liquidation of the business of said corporation; and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the corporate charter of said Southern Surety Company of New York be and the same hereby is forfeited, surrendered and annulled, and said Southern Surety Company of New York is hereby dissolved.

Enter,

96 J. F.,
J. S. C.

Exhibit B

Fidelity Department

Bond No.....

SOUTHERN SURETY COMPANY OF NEW YORK

HEAD OFFICE—ST. LOUIS, MO.

PRIMARY BLANKET FIDELITY BOND
Standard Form A

Initial premium on
this bond is $150

KNOW ALL MEN BY THESE PRESENTS, That, in consideration of an annual premium, the SOUTHERN SURETY COMPANY OF NEW YORK (hereinafter called Surety) hereby agrees to indemnify JOHN DEMARTINI CO. INC. of San Francisco, California (hereinafter called Employer) against any and all direct loss or losses of money or other personal property belonging to the Employer or in which the Employer has a pecuniary interest, or held by the Employer as collateral, or as bailee, trustee or agent, and whether or not the Employer is legally liable for the loss thereof which the Employer shall sustain, to an amount not exceeding in the aggregate the sum of TEN THOUSAND AND NO/100 Dollars ($10,000) through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication, or other fraudulent or dishonest act or acts committed by any one or more of the Employees as defined in SECTION A, paragraph 2, acting directly or in collusion with others, during the term of this bond as defined in SECTION A, paragraph 1, and while this bond is in force as to the Employee or Employees causing such loss

100 *Exhibit B*

or losses, and discovered, as provided in SECTION B, paragraph 2, before the expiration of twelve months from the cancellation of this bond as to such Employee or Employees or the cancellation of this bond as an entirety, whichever shall first happen.

This bond is executed and accepted subject to the agreements and limitations set forth in SECTION A of this bond, and the conditions set forth in SECTION B of this bond, which conditions shall be conditions precedent to recovery under this
101 bond.

SECTION A.

1. The term of this bond begins with the 12th day of December, 1930, standard time, at the address of the Employer above given, and ends at 12 o'clock night, standard time, as aforesaid, on the effective date of the cancellation of this bond; and the payment of annual premiums during such term shall not render the amount of this bond cumulative from year to year.

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2. The word "Employees," as used in this bond, shall be deemed to mean all natural persons (except directors of the Employer, if a corporation, who are not also officers thereof) who, on the effective date of this bond, or at any other time during the term of this bond, are in the regular service of the Employer in the ordinary course of the Employer's business, and who are compensated by salary, wages, and/or commissions, and whom the Employer has the right to govern and direct at all times in the performance of such service, and who

Exhibit B 103

are engaged in such service within any of the states of the United States, or within the District of Columbia, the Hawaiian Islands, Alaska, Canada or Newfoundland, but not to mean brokers, factors, commission merchants, consignees, contractors, or other agents or representatives of the same general character.

3. If any natural persons shall be taken into the regular service of the Employer, through merger or consolidation with some other concern, the Employer shall give the Surety written notice 104
thereof; and the Employer shall pay to the Surety additional premium on any increase in the number of Employees covered hereunder as a result of such merger or consolidation computed pro rata from the date of such merger or consolidation to the end of the current premium year.

4. If the Employer shall state an intention to carry fidelity suretyship upon any of the Employees and shall, in any premium computation for this bond, receive credit for such suretyship, then in case a loss shall be sustained through any 105
fraudulent or dishonest act which shall, during the period for which such credit is given, be committed by any Employee covered, or stated to be covered, by such suretyship, the Surety shall be liable under this bond only for so much of said loss as exceeds the amount of fidelity suretyship on such Employee for which such credit has been given.

5. If the Employer shall hold or be entitled to the benefit of any valid and enforceable insurance or suretyship against any loss covered under this

bond, other than the fidelity suretyship, if any, for which credit has been given in accordance with the preceding paragraph, the Surety shall not be liable under this bond for a greater proportion of such loss than the amount of this bond bears to the aggregate amount of this bond and such other insurance or suretyship.

6. Any sum paid in settlement of any loss under this bond shall be deducted from the amount of this bond, such deduction to be effective as of the
107 date upon which the Employer sends to the Surety notice of such loss, and only the remainder of such amount shall apply to other losses resulting from fraudulent or dishonest acts, whether committed before said date or thereafter, or partly before and partly thereafter. The sum so deducted shall be automatically restored as of said date, but only as to losses resulting from fraudulent or dishonest acts committed thereafter; and in consideration of such restoration the Employer shall pay to the Surety, on demand, an additional premium computed pro rata upon the sum so restored from said
108 date of restoration to the end of the premium year. In no event shall the Surety be liable under this bond for an amount greater than that specified in lines 9 and 10 of this bond on account of any one loss or series of losses caused by the fraudulent or dishonest acts of any Employee or combination of Employees.

7. In case any reimbursement be obtained or recovery be made by the Employer or the Surety on account of any loss covered under this bond, the net amount of such reimbursement or recovery, after deducting the actual cost of obtaining or

making the same, shall be applied to reimburse the Employer in full for that part, if any, of such loss in excess of the aggregate of the amounts of all bonds, fidelity insurance, indemnity and security, including this bond, taken by or for the benefit of the Employer and covering such loss, and the balance, if any, or the entire net reimbursement or recovery, if there be no such excess loss, shall be applied to that part of such loss covered by this bond, or, if payment shall have been made by the Surety, to its reimbursement therefor. The Employer shall execute all necessary papers and render all assistance, not pecuniary, to secure unto the Surety the rights provided for in this paragraph. The following shall not be reimbursement or recovery within the meaning of this paragraph: suretyship, insurance or reinsurance; also security or indemnity taken from any source by or for the benefit of the Surety. 110

8. This bond shall be deemed canceled as to any Employee: (a) immediately upon discovery by the Employer, or, if the Employer be a copartnership, by any partner thereof, or, if the Employer be a corporation, by any officer thereof not in collusion with such Employee, of any fraudulent or dishonest act on the part of such Employee; or (b) at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served upon the Employer or sent by registered mail. Such date, if the notice be served, shall be not less than fifteen days after such service, or, if sent by registered mail, not less than twenty days after the date borne by the sender's registry receipt. 111

112 *Exhibit B*

9. This bond shall be deemed canceled as an entirety at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served by the Employer upon the Surety or by the Surety upon the Employer, or sent by registered mail. Such date, if the notice be served by the Surety shall be not less than thirty days after such service, or, if sent by the Surety by registered mail, not less than thirty-five days after the date borne by the sender's registry receipt. In case of cancellation the Surety shall, on demand, refund
113 to the Employer the unearned premium computed pro rata, but such return premium shall be repaid to the Surety in case of payment of a loss under this bond.

SECTION B.

1. No Employee, to the best of the knowledge of the Employer, or, if the Employer be a copartnership, of any partner thereof, or, if the Employer be a corporation, of any officer thereof not in collusion with such Employee, has committed any fraud-
114 ulent or dishonest act in any position in the service of the Employer or otherwise.

2. The Employer shall notify the Surety by telegram or registered letter addressed and sent to it at its Head Office in the City of St. Louis, Missouri, of any fraudulent or dishonest act on the part of any Employee at the earliest practicable moment, and at all events not later than fifteen days after discovery thereof by the Employer, or, if the Employer be a copartnership, by any partner thereof, or, if the Employer be a corporation, by any officer thereof not in collusion with such Employee.

Exhibit B

3. Within ninety days after discovery of any fraudulent or dishonest act as aforesaid, the Employer shall file with the Surety affirmative proof of loss, itemized and duly sworn to, and shall, if requested by the Surety, produce from time to time, for examination by its representatives, all books, documents and records pertaining to such loss.

4. No suit to recover on account of loss under this bond shall be brought before the expiration of three months from the filing of proof as aforesaid on account of such loss, nor after the expiration of twelve months from the discovery as aforesaid of the fraudulent or dishonest act causing such loss.

5. If any limitation in this bond for giving notice, filing claim or bringing suit is prohibited or made void by any law controlling the construction of this bond, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

POLICY OR BOND RIDER

Wherever the words "SOUTHERN SURETY COMPANY" appear hereon, this instrument is hereby amended to read "SOUTHERN SURETY COMPANY OF NEW YORK."

Wherever the words "GENERAL OFFICES, DES MOINES, IOWA, and/or GENERAL OFFICES, ST. LOUIS, MO." appear or when reference is made to any office of the Company, this instrument is hereby amended

118 *Exhibit B*

to read "PACIFIC HEAD OFFICE, SAN FRANCISCO, CALIFORNIA."

SOUTHERN SURETY COMPANY OF NEW YORK,

By J. R. MALONEY
Vice-President.

Countersigned: WESLEY KING,
Attorney-in-Fact.

119 Signed, sealed and dated this 12th day of December, 1930.

SOUTHERN SURETY COMPANY OF NEW YORK,

By WESLEY KING,
WESLEY KING, Attorney-in-fact.

120

Exhibit C

121

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND

BALTIMORE

General Reinsurance Agreement

THIS AGREEMENT, made as of the first day of April, 1930, by and between the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation organized under the laws of the State of Maryland, party of the first part, and the SOUTHERN SURETY COMPANY OF NEW YORK, a corporation 122
organized under the laws of the STATE OF NEW YORK, party of the second part, witnesseth as follows:

1. That the parties hereto may desire from time to time to reinsure with each other, and may so reinsure, Fidelity, Surety, Forgery, Blanket Bond, and other risks or parts thereof;

2. That offerings of such reinsurance may be made by means of instruments executed in duplicate counterparts, of a form substantially agreeing 123
with the sheet attached entitled "Offer of Reinsurance," and made a part hereof;

3. That when such offerings of reinsurance have been accepted by the offeree, as evidenced by the latter's signing of the form of acceptance embodied in the said sheet attached, the reinsurance so effected shall be subject to the "Standard Form of Reinsurance Agreement," adopted by the Surety Association of America on January 15, 1930, here-

124 *Exhibit C*

inafter called the NEW AGREEMENT, attached hereto and made a part hereof;

4. That offerings of reinsurance may be made by ordinary correspondence or orally and may be accepted similarly, and that when such offerings are made and accepted the reinsurance so effected shall be subject to the New Agreement;

5. That all reinsurances between the parties hereto current on the date hereof, including all
125 reinsurances carrying latent, as distinguished from active, liability, on the date hereof, in virtue of agreements executed heretofore upon either the Standard Form of Reinsurance Agreement adopted by the Surety Association of America on May 12, 1915, or the similar Standard Form so adopted and promulgated by the Secretary of the Association on March 13, 1929, or any other form of faculative concurrent reinsurance agreement covering Fidelity and Surety business hereinafter called the OLD AGREEMENTS, be subject, as to losses which have either not occurred at the date hereof or are
126 not now known to either of the parties hereto, or which, while now known to one or both of the parties hereto, have not yet been settled, to the following provisions of the NEW AGREEMENT:

(*a*) The one making the Reinsurer liable for INTEREST, in addition to "costs and expenses" (lines 9 and 18);

(*b*) The one automatically restoring the Reinsurer's initial liability when the reinsured bond is similarly restored (lines 20 tnd 21);

(*c*) The one maintaining the Reinsurer's liability if an agent of the Reinsured changes the reinsured bond or some instrument concerned therewith (lines 96-98).

(*d*) The one giving the Reinsurer a right to reimbursement from the Reinsured in case the former is attacked directly (lines 152-169);

6. That all the said reinsurances between the parties hereto be subject, from the date hereof, to the following provisions of the New Agreement:

(*a*) The one requiring the Reinsured to give the Reinsurer *prompt* written notice of any loss, instead of "immediate" written notice (line 57);

(*b*) The one permitting the Reinsured to consult Reinsurers regarding points falling within the Reinsured's own discretion, without thereby impairing the Reinsured's rights in that respect (lines 66-69);

(*c*) The one prescribing participation by the Reinsurer in bonds issued by the Reinsured in connection with loss settlements (lines 70 and 71);

(*d*) The one defining the cancelation rights of the parties to the Agreement (lines 99-111);

(*e*) The one absolving the Reinsured from liability for subsequent premiums that "prove to be uncollectible" (lines 181 and 182);

(*f*) The one making the arbitration of disagreements compulsory (lines 185 and 192).

130 *Exhibit C*

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be signed by appropriate officers, and their respective corporate seals to be hereunto affixed and duly attested.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By W. N. BISHOP,
Vice-President.

Attest:

131 Frank A. Welsh,
Assistant Secretary.

[SEAL]

SOUTHERN SURETY COMPANY OF NEW YORK

By W. D. DEAN,
Vice-President.

Attest:

Paul Brown,
Assistant Secretary.

132 [SEAL]

Form of bond and Execution
Approved by (signature illegible)

Exhibit C 133

CONTRACT DEPARTMENT

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

Fidelity and Surety Bonds
Burglary and Plate Glass Insurance

BALTIMORE

OFFER OF REINSURANCE

We submit herewith for your consideration reinsurance of $. on the following bond, to 134
take effect simultaneously with the taking effect of the bond.

Principal	Gross Premium
	Rate
Address	Reinsurance commission
	Term
Obligee	State charged
	Accepted by
Address	
Nature of bond	Our bond No. 135
Amount of bond	Form of bond
Amount of contract	Papers submitted
Effective date of bond	
Our retention	Additional information

Very truly yours,

Fidelity and Deposit Company of Maryland,

By.....

136 *Exhibit C*

ACCEPTANCE OF REINSURANCE

Date:

Fidelity and Deposit Company of Maryland,

The above offer is hereby accepted to the extent of Dollars ($), to take effect simultaneously with the taking effect of the bond, subject to the terms of the general re-
137 insurance agreement in force between our two companies. The initial premium is $

Very truly yours,

Reinsurer's No.

138

Form G[illegible] 30199
(Standard Form of Reinsurance Agreement adopted by the Surety Association of America, 1-15-30)

Exhibit C continued

Fidelity and Deposit Company
OF MARYLAND
BALTIMORE

IN CONSIDERATION of the premium payable under section 1 hereof.....
.....
hereinafter called the REINSURER, does hereby reinsure FIDELITY AND DEPOSIT COMPANY OF MARYLAND, hereinafter called the REINSURED, under bond numbered....., together with all riders attached thereto, hereinafter called the BOND, issued by the Reinsured in the penalty of.....
.....Dollars, in favor of.....(obligee), and in behalf of.....
hereinafter called the Principal, against loss thereunder and against costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement.

The foregoing agreement is subject to the following conditions and provisions:

1. The premium payable hereunder by the Reinsured to the Reinsurer shall be that proportion of the total premium chargeable for the bond (including additional or renewal premiums) which the amount of the Reinsurer's liability bears to the total liability under the bond, less the commission prescribed by the rules of the Surety Association of America, for.....
term of the bond.....*

2. The Reinsurer's total liability hereunder is limited to.....
.....Dollars and the Reinsurer's proportionate share of costs and of expenses as hereinafter defined and of interest; but the Reinsurer shall in no event be liable hereunder for a greater proportion of any loss, costs, expenses, and interest than the proportion that the amount of reinsurance bears to the amount of the bond. If, however, the bond has a restoration clause, the limit of the Reinsurer's total liability hereunder, whenever that clause becomes operative, shall be correspondingly increased.

3. Unless otherwise expressly agreed, the amount of liability retained by the Reinsured at its own risk both when this agreement is made and at the time of any breach of the bond resulting in a claim thereunder shall be:

(a) If the bond be other than a depository bond or blanket bond, in no event less than the amount ceded hereunder, such retention to be carried under the bond; or

(b) If the bond be a depository bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to the Reinsurer under any other depository bond or bonds issued by the Reinsured in behalf of the Principal and effective at the time of any breach of the bond resulting in a claim thereunder, such retention to be carried under any depository bond or bonds issued and/or any depository reinsurance or reinsurances carried by the Reinsured in behalf of the Principal; or

(c) If the bond be a blanket bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to the Reinsurer under any other blanket bond or bonds issued by the Reinsured in favor of the same insured and effective at the time of any breach of the bond resulting in a claim thereunder; such retention to be carried under any blanket bond or bonds issued and/or any blanket bond reinsurance or reinsurances carried by the Reinsured in favor of the same insured. The actual retained liability of the Reinsured as aforesaid shall not be more remote than that ceded to the Reinsurer, whether it be primary or excess or partly primary and partly excess.

If it shall be found in the event of a claim that the Reinsured, through inadvertence or error, is not carrying the required amount, or if for the same reason its liability is more remote, the reinsurance shall not completely lapse, but an adjustment shall be made equalizing the difference, the Reinsurer's liability being reduced and the Reinsured's liability increased so that the liability of each shall be equal. A corresponding readjustment shall be made of the reinsurance premium.

If there are two or more reinsurers concerned with the bond whose agreements have been similarly breached, and if the Reinsured shall make with any of them a like adjustment whereby it shall assume as much liability as it must carry hereunder, it shall be deemed to have complied with its retention requirement hereunder.

If the Reinsurer has accepted reinsurance from the Reinsured upon two or more depository bonds issued by the Reinsured in behalf of the Principal, and if a reduction of the Reinsurer's liability thereunder is required by the preceding part of this section, such reduction shall be applied to each of such bonds in the proportion that the reinsurance accepted on each bond bears to the total reinsurance accepted on all such bonds. Likewise where the Reinsurer is carrying both primary and secondary liability ceded by the Reinsured upon blanket bonds in favor of the same insured, then the reduction shall be made proportionately in the same manner for each kind of reinsurance ceded.

It is further provided that any depository bonds issued by the Reinsured other than the bond, or depository reinsurances concerned with the bond accepted by the Reinsured, shall be regarded as non-existent so far as this agreement is concerned if the bonds so issued, or bonds so reinsured, are to the knowledge of the Reinsured secured by collateral or indemnity in a degree substantially different from that incident to the bond, to the extent that such collateral or indemnity proves to be valid and available for its intended use. If, however, the collateral or indemnity is not available, and payment must be made under the bond issued, the reinsurance hereunder shall be payable without regard to such indemnity or collateral but subject only to an obligation on the part of the Reinsured to make a proportionate refund to the Reinsurer if and when and to whatever extent such collateral or indemnity may prove to be valid.

4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer prompt written notice thereof at the Reinsurer's home office. The term "home office," wherever used herein, shall be deemed to mean the home office in the United States. The Reinsured shall take charge of all matters arising under the bond in connection with claims. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims, and defend, settle, or compromise any suits, and take such other action, not involving the extention of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under some other bond or bonds given at any time by the Reinsured.

The Reinsured's authority to handle and settle claims in accordance with its own judgment as outlined above shall not be annulled, abridged, or otherwise affected if the Reinsured consults the Reinsurer, by letter, in conference, or otherwise, with reference to such handling and settling of claims; provided that the reservation of rights on the part of the Reinsured effected by this paragraph shall apply only to matters and questions, the sole determination of which is left by this agreement in the hands of the Reinsured.

If any loss hereunder shall be settled, wholly or in part, through the issuance by the Reinsured of a surety bond, the Reinsurer shall participate in such bond in the proportion defined in section 2 hereof.

The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond.

The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

The term COSTS AND EXPENSES shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in investigating, settling, or defending, or attempting to defend, any suit or proceeding based upon the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; and all expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond.

5. If the Reinsured shall receive information pertaining to the bond prompting a special investigation, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in making such investigation and taking any action that it may deem advisable to prevent or diminish a loss under the bond. If the Reinsured finds it necessary or deems it advisable to procure a release from or a cancelation of the bond, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in effecting or attempting to effect such release or cancelation.

If the bond be a fiduciary, public official, or other instrument reasonably requiring an audit of the principal's accounts the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in auditing such accounts.

The word "expenses" as used in this section shall not be held to include the compensation of any person employed by the Reinsured on salary.

6. In case any change or alteration in the bond, or in any instrument, contract, or agreement concerned with the bond, shall be proposed, the Reinsured shall not make such change or permit such alteration without securing from the Reinsurer's home office

*(If only one premium for all time is payable, complete line 15 with the words, the full. If the annual premium is constant, complete line 15 with the words, each year of the. If there is a graduated premium rate, write before the word "term," in line 15, the first year of the, and complete the line with whatever is appropriate in the given case.)

Exhibit C-Continued

the written consent thereto of the Reinsurer. This section, however, shall be deemed not to apply to any change or alteration made or permitted by an agent of the Reinsured's without knowledge of such change or alteration on the part of any officer or executive located at the home office of the Reinsured.

7. If the Bond contains a valid cancelation clause, then and not otherwise this agreement may be canceled by the Reinsurer at any time by serving upon or sending by registered mail to the Reinsured, at its home office, a written notice stating the latest date upon which the Reinsured shall mail to or serve upon the obligee of the bond a cancelation notice, such date to be not less than fifteen days from such service, or, if such written notice be sent by registered mail, not less than twenty days from the date borne by the sender's registry receipt; and the Reinsured shall give a cancelation notice canceling the bond at the earliest date upon which the bond can be canceled in accordance with its terms. If the Reinsured shall not give notice canceling the bond within the time hereinbefore provided, this agreement shall terminate at the expiration of such period from the date specified in such written notice as shall equal the shortest time for effecting cancelation of the bond in accordance with its terms, except as to losses under the bond that occurred prior to the effective date of cancelation.

The Reinsured may cancel this agreement at any time by notifying the Reinsurer in writing, at the Reinsurer's home office, of such cancelation and the effective date thereof. This effective date shall not be prior to the date of such notification unless the bond has been terminated prior thereto.

In case of cancelation of this agreement the Reinsurer shall be entitled only to a pro rata earned premium.

8. If the bond does not provide in terms for cancelation at any time by the Reinsured, but if in the opinion of the Reinsurer the Reinsured through legal proceedings or otherwise can procure a valid release from liability under the bond, the Reinsurer may require the Reinsured to take the necessary steps to procure such release, by notifying the Reinsured of its desire to terminate its liability and by giving the Reinsured detailed and complete information as to the course that it should take to procure the said release; and if the Reinsured shall fail to institute the necessary proceedings within thirty days from the date on which it has received from the Reinsurer the said notification and the said complete information, and diligently prosecute the same, the liability of the Reinsurer hereunder shall terminate at the expiration of the said thirty days as to any and all subsequent breaches of the bond. In the event of such termination of liability the Reinsurer shall be entitled only to a *pro rata* earned premium.

9. No action shall be brought against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond. If, however, this reinsurance shall end before the termination of the bond, no action shall be brought against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond with which the Reinsurer is concerned.

10. The Reinsurer shall be entitled to share with the Reinsured, in the proportion defined in section 2 hereof, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond. The Reinsurer and the Reinsured shall share any salvage or recovery except a recovery based on additional agreements of reinsurance, made by either on account of any loss in the proportion defined in section 2 hereof. In case the Reinsured shall carry excess reinsurance on the bond the Reinsurer's share of salvage shall be the same as if no such excess reinsurance were carried.

11. The liability hereunder of the Reinsurer begins*..... and ends, unless this agreement shall be previously canceled in accordance with the terms hereof, with the termination of the liability of the Reinsured. If the liability of the Reinsured by the terms of the bond be continuable for one or more additional periods by the issuance of one or more continuation certificates, the acceptance of an additional premium or premiums, or otherwise, and if the liability be so continued, and if the Reinsurer shall not, at least thirty days before the expiration of the original or of any continued period, have notified the Reinsured in writing, at the latter's home office, of its desire not to continue the reinsurance, this agreement shall apply to such additional period or periods.

12. If the reinsurance hereunder shall be canceled as provided herein before the termination of the bond, the Reinsurer shall not be liable on account of any losses which occurred before the effective date of such cancelation, but which were unknown to the Reinsured at that date, unless notification thereof shall be received by the Reinsured within a period beginning on the effective date of such cancelation and continuing for a term equal to that of the cutoff period, plus the notification period, defined in the bond—that is, the time within which the obligee of the bond must discover any loss indemnifiable thereunder and give the Reinsured notification thereof. If, however, the said notification period is not defined precisely in the bond (as a stated number of days, a "month," or the like), the said notification of a loss unknown to the Reinsured at the effective date of cancelation shall be received by the Reinsured, if the Reinsurer is to be concerned with the loss, within a period beginning on the effective date of such cancelation and continuing for a term equal to that of the cutoff period, plus thirty days.

If the effective date of reinsurance hereunder is subsequent to the effective date of the bond, and if a loss under the bond, or any part thereof, cannot be allocated to the period ending with the effective date of this reinsurance, the date of the discovery of such loss, or the part thereof that cannot be so allocated, shall be deemed to be the date of occurrence.

If reinsurance hereunder supersedes, in whole or in part, any canceled reinsurance, the Reinsurer hereby assumes liability wholly or in *pro rata* part, as the case may be, for losses which occurred before the effective date of the cancelation of such superseded reinsurance, but notification of which was not received by the Reinsured before the expiration of the period specified in the first paragraph of this section.

13. If, under any law, this agreement is required to be in such form as to enable the obligee or beneficiary of the bond to maintain an action hereon against the Reinsured jointly with the Reinsurer, and upon recovering judgment against the Reinsured to have recovery against the Reinsurer for payment to the extent in which it may be liable under this reinsurance and in discharge thereof, then this agreement shall be deemed to be a compliance with such law, and if in consequence thereof either party hereto is forced to pay, on account of loss, attorneys' fees and expenses an amount in excess of its proportion fixed in this agreement, such excess shall be repaid by the other party hereto.

If the Reinsurer be required by any rule or regulation to execute a so-called reinsurance agreement directly in favor of the obligee of the bond, and be forced to make payment under such reinsurance agreement, the amount of such payment, if equal to or less than the amount of the Reinsurer's liability hereunder, shall be credited against such liability, or if greater than such liability shall be repaid by the Reinsured to the extent of such excess.

If any action shall be brought against the Reinsurer under this agreement, or if any letter or paper shall be received by the Reinsurer apparently foreshadowing such action, or otherwise indicating an intention on somebody's part to collect from the Reinsurer a claim, or part of a claim, based upon the bond, the Reinsurer shall promptly notify the Reinsured thereof, and the Reinsured shall thereupon take charge of and completely care for any such action or apparent preliminary procedure; and all costs, attorneys' fees, and expenses incurred by the Reinsured in connection therewith shall be apportioned in accordance with section 2 hereof. If, however, the Reinsurer is compelled to take charge of and care for, wholly or in part, any such action, preliminary procedure, or similar movement directed against the Reinsurer primarily, all payments made by the Reinsurer in connection therewith and for the settlement thereof, including attorneys' fees, interest, and incidental costs, shall be apportioned in accordance with section 2 hereof.

14. Every premium payable by the Reinsured to the Reinsurer shall be an absolute obligation, except as provided in paragraph B of this section, whether or not the Reinsured shall collect from its own debtor the premium on the bond; and such obligation shall be discharged as follows:

(a) The initial premium shall be remitted by the Reinsured to the Reinsurer so as to be in the latter's hands by the last business day of the month in which this agreement is executed, if ninety days have elapsed between the date when the Reinsurer's liability hereunder begins and the date of this agreement; if ninety days have not so elapsed, by the twentieth day of the month following that in which the Reinsured collects the premium from its own debtor, and in any event by the twentieth day of the third month following that in which the Reinsurer's liability hereunder begins.

(b) Subsequent premiums shall be remitted by the Reinsured to the Reinsurer so as to be in the latter's hands by the twentieth day of the month following that in which the Reinsured collects such subsequent premiums from its own debtor, and in any event by the twentieth day of the third month following that in which such subsequent premiums are due to the Reinsured from its own debtor. In case, however, subsequent premiums upon uncancelable bonds prove to be uncollectible, no such subsequent premiums shall be payable by the Reinsured to the Reinsurer.

(c) The validity of this agreement shall be in no wise impaired or affected by the failure of the Reinsured, for any cause, to pay the Reinsurer either the initial premium or any subsequent premium due from the Reinsured to the Reinsurer.

15. This agreement shall be regarded by the parties hereto as an honorable engagement rather than as a mere legal obligation, and if any disagreement shall arise between the parties hereto as to the rights or liabilities incident to this agreement, the question or questions in dispute shall be referred to arbitrators, to be chosen from the managers or officers of bonding companies, as follows:

As soon as one of the parties hereto demands arbitration and names its arbitrator the other party binds itself to name a second arbitrator within three weeks. The two arbitrators so procured shall then select a third person to act as umpire, and the award of any two of such three persons shall be final and conclusive. The arbitration shall be held at some place agreed upon by the parties hereto, or, if they cannot so agree, at some place designated by the arbitrators. The cost of the arbitration shall be borne equally by the parties hereto.

IN WITNESS WHEREOF each of the parties hereto has caused this agreement to be signed by appropriate officers, and their respective corporate seals to be hereunto affixed and duly attested this.....day of

....., 193.....

Attest:

.....

By.....

.....

Attest: FIDELITY AND DEPOSIT COMPANY OF MARYLAND

.....

By.....

*(Line 129 is to be completed, according to circumstance, in one or the other of these ways: simultaneously with that of the Reinsured; on the

.....day of.....19.....)

47

Exhibit C

(PHOTOSTAT)

139

140

141

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Exhibit D

SOUTHERN SURETY COMPANY OF NEW YORK

PACIFIC HEAD OFFICE—SAN FRANCISCO, CALIF.
333 Montgomery Street

FIDELITY & DEPOSIT COMPANY OF MARYLAND
San Francisco, California

We beg to submit herewith reinsurance of one-half on the following bond to take effect December 12, 1930

Principal Employees
Obligee John DeMartini Co., Inc.
Funds covered — Form Primary, Standard Form A
143 Character of Bond Baby Blanket Bond — Bond No.
Amount of Bond $10,000 — Amt. of Prem. $150
Date of Bond December 12, 1930 — Term Continuous
Retention of Southern Surety Co. of New York $5,000 — Rate Manual

Yours very truly,

SOUTHERN SURETY COMPANY OF NEW YORK

By WESLEY KING
WESLEY KING, Secretary.

[CORPORATE SEAL]

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Date

Southern Surety Company of New York,
San Francisco, Calif.

The above offer is hereby accepted to the extent of FIVE THOUSAND AND NO/100 ($5,000.00) to take effect December 12, 1930 subject to the terms of the general reinsurance agreement in force between our two companies, the initial premium being $75.

3689084

Yours very truly,

FIDELITY & DEPOSIT COMPANY OF MARYLAND

By D. E. HORTON
Attorney-in-Fact.

Attest
C. A. BEVANS
Agent.

Form G1140--2M, 3-4-30 36496
(Standard Form of Reinsurance Agreement adopted by the Surety Association of America, May 12, 1915.)

Exhibit E No.....

Fidelity and Deposit Company
OF MARYLAND
BALTIMORE

IN CONSIDERATION of the premium stated in Section 1 hereof .....

.....

hereinafter called the Reinsurer, does hereby reinsure the Fidelity and Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered ....., hereinafter called the bond, issued by the Reinsured in the penalty of ..... Dollars, in favor of .....

[obligee], and in behalf of .....
[principal], against loss thereunder and against costs and expenses, as hereinafter defined. A copy of the bond is or is to be attached hereto, and is hereby made a part of this agreement.

The foregoing agreement is subject to the following conditions:

1. The premium payable hereunder by the Reinsured to the Reinsurer shall be .....

..... Dollars, less thirty per cent for

..... term of the bond

.....

2. The Reinsurer's total liability hereunder, hereinafter called the Reinsurance, is limited to .....

..... Dollars, and the Reinsurer's proportionate share of costs as defined in Condition numbered 5 hereof and of expenses as described in Condition numbered 6 hereof; but the Reinsurer shall in no event be liable hereunder for a greater proportion of any loss, costs, and expenses than the proportion that the amount of reinsurance bears to the amount of the bond.

3. The amount of liability retained by the Reinsured at its own risk under the bond while this agreement remains in force shall in no event be less than .....

..... Dollars [$].

4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer immediate written notice thereof at the Reinsurer's home office. The term home office wherever used herein shall be deemed to mean the home office in the United States.

5. The Reinsured shall take charge of all matters arising under the bond. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims, and defend, settle, or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under any other bond or bonds given at any time by the Reinsured.

The Reinsurer's proportionate share of a loss under the bond, and of costs as hereinafter defined, shall be paid to the Reinsured upon proof of such loss and costs, and proof of the payment thereof by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to pay its proportionate share of such loss before such date; but in that case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond.

The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

The term costs shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in investigating, settling, or defending, or attempting to defend, any suit or proceeding based upon the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; all expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond; but the term costs shall not be held to include the compensation of any person employed by the Reinsured on salary.

6. If the Reinsured shall receive information about the subject of the bond prompting a special investigation, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in making such investigation and taking any action that it may deem advisable to prevent or diminish a loss under the bond.

In the case of fiduciary and public official bonds the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in auditing the account of the principal under the bond.

7. In case any change or alteration in the bond, or in any instrument, contract, or agreement concerned with the bond, shall be proposed, the Reinsured shall not make such change or permit such alteration without securing, from the Reinsurer's home office, the consent thereto of the Reinsurer in writing. If such consent be given, and the change or alteration be made, the Reinsured shall give notice thereof in writing to the Reinsurer, at the Reinsurer's home office.

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*(If only one premium for all time is payable, complete line 13 with the words, **the full.** If the annual premium is constant, complete line 13 with the words, **each year of the.** If there is a Graduated premium rate, write before the word "term" in line 13 **the first year of the** and in line 14 whatever is appropriate in the given case.)

Exhibit E - Continued

This section, however, shall be deemed not to apply to any immaterial change or alteration made or permitted by an agent of the Reinsured's without knowledge of such change or alteration on the part of any officer or executive located at the home office of the Reinsured.

8. If the bond provides in terms for cancelation at any time by the Reinsured, then, and not otherwise, this agreement may be canceled by the Reinsurer at any time by a written notice stating when the cancelation takes effect, served on the Reinsured, or sent by registered mail to the Reinsured at its home office, at least forty days prior to the date when the cancelation takes effect. In case of such cancelation the Reinsurer shall be entitled only to the earned premium pro rata.

9. If the bond does not provide in terms for cancelation at any time by the Reinsured, but if in the opinion of the Reinsurer the Reinsured through legal proceedings or otherwise can procure a valid release from liability under the bond, the Reinsurer may require the Reinsured to take the necessary steps to procure such release, by notifying the Reinsured of its desire to terminate its liability and by giving the Reinsured detailed and complete information as to the course that it should take to procure the said release; and if the Reinsured shall fail to institute the necessary proceedings within thirty days from the date on which it has received from the Reinsurer the said notification and the said complete information, and diligently prosecute the same, the liability of the Reinsurer hereunder shall terminate at the expiration of the said thirty days as to any and all subsequent breaches of the bond. In the event of such termination of liability the Reinsurer shall be entitled only to the earned premium pro rata. If a release from liability is procured, or if an attempt is made to procure a release through legal or other proceedings, undertaken at the instance of either the Reinsurer or the Reinsured, the Reinsurer shall share the cost of such proceedings, aside from the cost included in the compensation of any person employed on salary by the Reinsured, in the proportion that the amount of the reinsurance bears to the amount of the bond.

10. No action shall lie against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond.

11. The Reinsurer shall be entitled to share with the Reinsured, in the proportion that the amount of the reinsurance bears to the amount of the bond, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond. The Reinsurer and the Reinsured shall share any salvage or recovery, except a recovery based on additional agreements of reinsurance, made by either on account of any loss in the proportion that the amount of the reinsurance bears to the amount of the bond.

12. The liability hereunder of the Reinsurer begins .....

.....

and ends with the termination of the liability of the Reinsured. If the liability of the Reinsured, by the terms of the bond, be continuable by the issuance of a continuation certificate, and if the liability be so continued, and if the Reinsurer shall not thirty days previously have notified the Reinsured, in writing at the latter's home office, of its desire not to continue the reinsurance, this agreement shall apply to such continuation of liability for one year.*

13. Every premium payable by the Reinsured to the Reinsurer shall be an absolute obligation, whether or not the Reinsured shall collect from its own debtor the premium on the bond; and such obligation shall be discharged as follows:

A. The initial premium shall be paid —by the tenth day of the month following that in which this agreement is executed, if ninety days have elapsed between the date of the bond and the date of this agreement; if ninety days have not so elapsed, by the tenth day of the month following that in which the Reinsured collects the premium from its own debtor, and in any event by the tenth day of the fourth month after the date of the bond.

B. Subsequent premiums shall be paid by the tenth day of the month following that in which the Reinsured collects such subsequent premiums from its own debtor, and in any event by the tenth day of the fourth month after the date on which such subsequent premiums are due to the Reinsured from its own debtor. In case, however, subsequent premiums upon uncancelable bonds cannot be collected by the Reinsured because of the insolvency of the Reinsured's principal, prior to the time stipulated for payment herein, no such subsequent premiums shall be payable by the Reinsured to the Reinsurer.

The validity of this agreement shall be in no wise impaired or affected by the failure of the Reinsured, for any cause, to pay the Reinsurer either the initial premium or any subsequent premium due from the Reinsured to the Reinsurer.

IN WITNESS WHEREOF the .....

..... *has caused this contract*

to be signed by its ..... *and its corporate*

seal to be hereunto annexed, attested by its .....

this ..... *day of* ....., *193*....

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Exhibit E

(PHOTOSTAT)

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148 *Bill of Exceptions*

At the trial of this cause such proceedings were had, such evidence was offered and introduced, such motions were made by the defendant, such rulings thereon were made by the Court and such exceptions were taken at the respective times of such rulings as hereinabove indicated.

Inasmuch as the matters and things above set forth do not fully appear of record, the defendant tenders and presents the foregoing as its bill of exceptions in this cause and prays that the same may be approved, settled, allowed, signed, sealed,
149 filed and made a part of the record in this cause by this Court.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant.

150

Stipulation as to Bill of Exceptions 151

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties 152
hereto that the foregoing bill of exceptions contains all of the proceedings had, evidence offered or introduced, motions made by the defendant, rulings thereon made by the Court and exceptions to such rulings taken by the defendant, at the trial of this cause; that said bill of exceptions is correct in all respects; and that the same may be approved, settled, allowed, signed, sealed, filed and made a part of the record in this cause by the Court upon the filing of this stipulation without further or other notice to the plaintiff.

Dated, New York, N. Y., August 5, 1936. 153

EUGENE M. CLENNON,
Attorney for Plaintiff.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant.

154 **Certificate and Order Settling Bill of Exceptions**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Upon reading the foregoing stipulation, it is

155 CERTIFIED AND ORDERED that the foregoing bill of exceptions contains all of the proceedings had, evidence offered or introduced, motions made by the defendant, rulings thereon made by the Court and exceptions to such rulings taken by the defendant, at the trial of this cause; that said bill of exceptions is correct in all respects; and that the same is hereby approved, settled and allowed and is hereby ordered on file and made a part of the record herein as the defendant's bill of exceptions in this cause.

156 Dated, New York, N. Y., September 26th 1936.

ALFRED C. COXE,
U. S. D. J.

Consent is hereby given to the form of the foregoing certificate and order.

EUGENE M. CLENNON,
Attorney for Plaintiff.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant.

Extract from Clerk's Minutes 157

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court House and Postoffice Building in the Borough of Manhattan, City of New York, on the 22nd day of June in the year of our Lord, One Thousand Nine Hundred and Thirty-six.

Present:

HONORABLE ALFRED C. COXE, *District Judge.*

158

[SAME TITLE]

Now comes the Plaintiff, by E. M. Clennon, I. Waldman of Counsel, and moves the trial of this cause. Likewise comes the Defendant, by Hughes, Schurman & Dwight, H. L. Smith of Counsel. Thereupon a Jury is duly impaneled and sworn, and the cause proceeds to Trial. Stipulation filed waiving Jury. Counsel for plaintiff opens to the Court and rests on stipulation. Attorney for defendant opens and moves to dismiss. Denied. Defendant rests and renews motion to dismiss and for judgment. 159

Case closed, argued and submitted. Decision reserved.

July 9—filed opinion No. 9931, Coxe, *J.* Judgment for plaintiff for $3,522.71 with interest from November 17, 1933 together with costs.

CHARLES WEISER,
Clerk

(An Extract of the Minutes.)

160

Opinion

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Appearances:

161 EUGENE M. CLENNON, Esq., Attorney for Plaintiff;
(Irvin Waldman, Esq. of Counsel).

Messrs. HUGHES, SCHURMAN & DWIGHT, Attorneys for Defendant;
(Ralph S. Harris, Harold L. Smith, E. Myron Bull and William L. Wilkinson, Esqs., of Counsel).

COXE, *D.J.*:

This is an action by the Superintendent of Insurance of the State of New York, as liquidator of Southern Surety Company of New York, against
162 the defendant, to recover the sum of $3,522.71 with interest from November 17, 1933, upon a reinsurance agreement entered into between Southern Company, during its existence, and the defendant.

The case was tried by the court without a jury on an agreed statement of facts.

The Southern Company was organized in New York State and had authority to do a surety and insurance business. On March 22, 1932, it was declared insolvent by order of the Supreme Court of New York, its charter annulled, and title to its assets vested in the Superintendent of Insurance, with instructions to liquidate the company.

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Prior to its insolvency, the Southern Company had in the regular course of its business issued its fidelity bond to one John De Martini Co., Inc., by which it bound itself to indemnify that company for any pecuniary loss which it might sustain through the fraudulent or dishonest acts of its employees during the term of the bond.

While the bond was in effect, John De Martini Co., Inc. sustained a loss of $7,045.41 as a result of the fraudulent and dishonest acts of one of its employees, for which it filed a proof of loss with the Southern Company. This claim was in the process 164
of examination and investigation when the Superintendent took charge, and the claim was thereafter allowed in the liquidation proceeding in the sum of $7,045.41.

On the same day the Southern Company issued its fidelity bond to the De Martini Company, the defendant reinsured the Southern Company to the extent of one-half its liability on the bond, not exceeding the sum of $5,000.00. This reinsurance was expressly made subject to the terms of a general reinsurance agreement existing between the Southern Company and the defendant, and it is 165
on this agreement that the plaintiff now seeks to recover the sum of $3,522.71, which is one-half of the admitted liability of the Southern Company on its bond.

The defendant contends that under the terms of the reinsurance agreement, actual payment of the loss to the De Martini Company is a prerequisite to recovery, and that the defendant is then liable only to the extent of one-half of the amount actually paid. The plaintiff, on the other hand, insists that inasmuch as the Southern Company is in liquidation, the defendant is liable for one-half of the

166 *Opinion*

claim, irrespective of whether the plaintiff pays the claim in full or only a liquidation dividend thereon.

The question presented has been determined adversely to the contention of the defendant in a long line of decisions, which have consistently held that under an ordinary agreement of reinsurance, the obligation of a reinsurer is to indemnify the reinsured not against payment actually made but against liability actually incurred. *Allemannia* v. *Firemen's,* 209 U. S. 326; *Hicks* v. *Poe,* 269 U. S. 118; *Hone* v. *Mutual,* 1 Sandf. Sup. C. R. 137,
167 aff'd 2 N. Y. 235; *Blackstone* v. *Allemannia,* 56 N. Y. 104; *Cashau* v. *Northwestern,* Fed. Cas. No. 2499; *Fame Ins. Co.'s Appeal,* 83 Pa. State 396; Vance on Insurance, 2d Ed. pages 942, 946.

In *Allemannia* v. *Firemen's* (*supra*), Mr. Justice Peckham said at page 332 of the opinion, as follows:

> "The term 'reinsurance' has a well-known meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed 'double insurance', i.e., an in-
> 168 surance of the same interest. The contract is one of indemnity to the person or corporation reinsured, and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured or by its in-

ability to fulfill its own contract with the original insured. The claim of the reinsured rests upon its liability to pay its loss to the original insured, and is not based upon the greater or less ability to pay by the reinsured."

The defendant attempts to distinguish these cases on the ground that the agreements are dissimilar. But a careful comparison of the present agreement with the agreement in *Allemannia* v. *Firemen's* (*supra*) discloses no essential difference 170
in so far as the question under consideration is concerned. In the Allemannia case, the payment clause provided that the reinsurer would in no event be "liable for an amount in excess of a ratable proportion of the sum *actually paid* to the assured". Yet the Supreme Court held that the receiver of the reinsured could recover without actual payment to the assured. The analogous clause of the present agreement provides that the reinsurer's proportionate share of a loss "shall be paid to the reinsured upon proof of the payment * * * by the reinsured". There is no substantial 171
difference between these two provisions, even though the present agreement requires "proof of the payment", where payment has been made.

I think, also, that the entire phraseology of the agreement indicates that no departure from the settled law of the Allemannia case was intended. In the first place, the agreement itself declares that it is to be regarded "as an honorable engagement rather than as a mere legal obligation". Then, too, the reinsured is alone authorized to determine its liability on the bond, and settle all claims, subject to the right of the reinsurer later

to show "that the alleged liability or any part thereof for loss under the bond exists or existed under some other bond or bonds given at any time by the reinsured". Finally, it is provided that no action shall be brought against the insurer "unless brought within twelve months after the date of the final *settlement* of all obligations under the bond". Surely, if it had been intended to make actual payment of the claim a prerequisite to recovery where the reinsured was in liquidation, it is reasonable to suppose that unequivocal language to that effect
173 would have been used. I hold, therefore, that the words "proof of the payment" mean either proof that the reinsured has paid or is "bound to pay according to its policy". *Cashau* v. *Northwestern* (*supra*).

There may be a judgment for the plaintiff for $3,522.71, with interest from November 17, 1933, together with costs.

July 9, 1936.

(sgd) ALFRED C. COXE
U. S. D. J.

174

Judgment 175

IN THE

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT.

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before Hon. Alfred C. Coxe, District Judge, without a jury pursuant to a written stipulation herein filed, at a 176
Term of this Court held at the United States District Courthouse of the Southern District of New York, on the 22nd day of June, 1936, and Irvin Waldman of Counsel (Eugene M. Clennon, attorney) having appeared for the plaintiff and Harold L. Smith, of Counsel (Hughes, Schurman & Dwight, attorneys) having appeared for the defendant, and an agreed statement of facts having been submitted to the Court, and the defendant having moved at the close of the plaintiff's case, and at the close of the whole case, to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement 177
of facts do not as a matter of law afford support for a judgment for the plaintiff, and at the close of the whole case to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for the plaintiff, and at the close of the whole case for judgment for the defendant on all the grounds open to the defendant on the issues and pleadings and all of said motions having been denied and the defendant having duly excepted thereto, and the Judge having duly rendered a ver-

178 *Judgment*

dict in favor of the plaintiff and against the defendant in the sum of Three Thousand Five Hundred Twenty-Two and 71/100 ($3,522.71) Dollars, with interest from November 17, 1933, together with costs, and the costs of the said plaintiff having been duly taxed at Twenty-Five and 00/100 ($25.00) Dollars;

Now, on motion of Eugene M. Clennon, attorney for the plaintiff, it is

179 ADJUDGED that the plaintiff, Louis H. Pink Superintendent of Insurance of the State of New York; of 111 John Street, New York City as Liquidator of the Southern Surety Company of New York, recover of the defendant, Fidelity and Deposit Company of Maryland, the sum of Three Thousand Five Hundred Twenty-Two and 71/100 ($3,522.71) Dollars, together with interest amounting to Five Hundred Seventy-Seven and 89/100 ($577.89) Dollars, totaling Four Thousand One Hundred and 60/100 ($4,100.60) Dollars, together with Twenty-Five and 00/100 ($25.00) Dollars costs as taxed, making in all the sum of Four Thousand One Hun-
180 dred Twenty-Five and 60/100 ($4,125.60) Dollars, and that the plaintiff have execution therefor.

JUDGMENT signed and entered this 20th day of August, 1936.

CHARLES WEISER,
Clerk.

We hereby consent to the form of the foregoing judgment, and waive notice of entry.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

Petition for Appeal

181

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To the Honorable the District Judges of the United States District Court for the Southern District of New York:

Your petitioner, Fidelity & Deposit Company of Maryland, defendant in the above entitled cause, 182
hereby prays that it be permitted to take an appeal from the final judgment entered in this cause on the 20th day of August, 1936, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith; that said appeal be allowed; that a citation be issued in accordance with law; that a duly authenticated transcript of the record and proceedings in this cause be transmitted to said United States Circuit Court of Appeals; that the amount of security to be given by appellant in order that said appeal shall operate 183
as a supersedeas be fixed; and that, upon the giving of said security, said appeal operate as a supersedeas.

Dated, New York, N. Y., September 24, 1936.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Defendant,

By HUGHES, SCHURMAN & DWIGHT,
Its Attorneys,
Office & Post Office Address:
100 Broadway,
New York, N. Y.

HAROLD L. SMITH,
Of Counsel.

184 **Assignment of Errors**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Comes now Fidelity & Deposit Company of Maryland, defendant in the above entitled cause, and files the following assignment of errors upon
185 which it will rely in the prosecution of the appeal herewith petitioned for from the final judgment entered in this cause on the 20th day of August, 1936:

1. The District Court erred in denying defendant's motion, made at the close of plaintiff's case and renewed at the close of the whole case, to dismiss the complaint and to non-suit plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for plaintiff.

2. The District Court erred in denying defend-
186 ant's motion, made at the close of the whole case, to dismiss the complaint and to non-suit plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for plaintiff.

3. The District Court erred in denying defendant's motion made at the close of the whole case for judgment for defendant.

4. The District Court erred in holding that upon the pleadings, proceedings and proof plaintiff is entitled to judgment against defendant.

5. The District Court erred in not holding that delivery of proof of the payment by the reinsured of the loss under the bond referred to in the agreement sued upon is a condition precedent to any obligation on the part of the reinsurer to pay reinsurance under such agreement, except where the reinsured gives written notice of its intention to pay the loss on a certain date and requires payment of the reinsurance by that date.

6. The District Court erred in not holding that the obligation of the reinsurer to the reinsured 188
under the agreement sued upon is merely to indemnify the reinsured against one-half of any loss which it may suffer under the bond referred to in such agreement.

7. The District Court erred in not holding that, not having paid the claim on the bond referred to in the agreement sued upon, the reinsured has suffered no loss under such bond.

8. The District Court erred in holding that the agreement sued upon is an agreement to indemnify the reinsured against one-half of any liability it 189
may incur under the bond referred to in such agreement.

Dated, New York, N. Y.,
September 24, 1936.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant,
Office & Post Office Address:
100 Broadway,
New York, N. Y.

HAROLD L. SMITH,
Of Counsel.

190

Order Allowing Appeal, with Supersedeas

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

191 The petition of Fidelity & Deposit Company of Maryland, defendant in the above entitled cause, for an appeal from the final judgment entered in this cause on the 20th day of August, 1936, is hereby granted and said appeal is allowed upon the petitioner filed a bond in the sum of Four Thousand Six Hundred Twenty-three and 14/100 Dollars ($4,623.14) with sufficient sureties conditioned as required by law, whereupon said appeal shall operate as a supersedeas.

Dated, New York, N. Y.
September 26, 1936.

192

ALFRED C. COXE,
U. S. D. J.

193

Citation

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

By the Hon. Alfred C. Coxe, one of the U. S. District Judges, for the Southern District of New York, in the Second Circuit: 194

To:

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, State of New York, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the office of the Clerk of the United States District Court for the Southern District of New York, wherein Fidelity & Deposit Company of Maryland is appellant and you are appellee, to show cause, if any there be, why the judgment appealed from should not be corrected and why speedy justice should not be done to the parties in that behalf. 195

196 *Citation*

WITNESS the HONORABLE ALFRED C. COXE, Judge of the United States District Court for the Southern District of New York this 26th day of September, 1936.

ALFRED C. COXE,
U. S. D. J.

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197 Copy received September 30, 1936.

E. M. CLENNON,
Attorney for Superintendent
as Liquidator, etc.

198

Stipulation for Enlargement

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by the respective attorneys, that the time of the appellant herein to docket its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including October 28, 1936, and that an order to that effect may be entered upon the filing of this stipulation without further or other notice to the plaintiff.

Dated: New York, N. Y., October 23, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant.

202

Order of Enlargement

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Upon reading and filing the stipulation annexed hereto, it is

203 ORDERED, that the time of the appellant herein to docket its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and it hereby is extended to and including October 28, 1936.

Dated: New York, N. Y., October 24, 1936.

CHARLES WEISER,
Clerk, United States District Court,
Southern District of New York.

204

We hereby consent to the entry of the foregoing order.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant.

Stipulation and Order of Enlargement 205

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by the respective attorneys, that the time of the appellant herein to docket its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including November 4, 1936. 206

Dated: New York, N. Y., October 27, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant. 207

So ordered: October 28th, 1936.

CHARLES WEISER,
Clerk, United States District Court,
Southern District of New York.

208 **Stipulation and Order of Enlargement**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that the time of the appellant herein to docket
209 its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including November 12, 1936.

Dated: New York, N. Y., November 2nd, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
210 Attorneys for Defendant-Appellant.

So ordered: November 4, 1936.

CHARLES WEISER,
Clerk, United States District Court,
Southern District of New York.

Stipulation and Order of Enlargement

211

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that the time of the appellant herein to docket its appeal and to have certified and to file the record 212 thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including November 17, 1936.

Dated, New York, N. Y., November 10, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant. 213

So ordered: November 12, 1936.

CHARLES WEISER
Clerk of U. S. District Court
Southern District of New York.

214

Defendant-Appellant's Praecipe

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To Honorable CHARLES WEISER,
Clerk of the United States District Court for the
Southern District of New York:

215

You will please incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, the following papers and exhibits, and no others, to wit:

1. Statement under Rule XIII.
2. Summons.
3. Complaint.
4. Stipulation for amendment of answer dated April 24, 1936.

216

5. Amended answer.
6. Stipulation waiving jury trial dated March 30, 1936.
7. Stipulation of facts.
8. Bill of exceptions, with exhibits included therein, as approved, settled and allowed by order of Hon. Alfred C. Coxe, dated September 26, 1936 and filed September 28, 1936.
9. Stipulation as to bill of exceptions.

Defendant-Appellant's Praecipe 217

10. Certificate and order settling bill of exceptions.
11. Extract from Clerk's minutes.
12. Opinion of Hon. Alfred C. Coxe.
13. Judgment.
14. Petition for appeal.
15. Assignment of errors.
16. Order allowing appeal, with supersedeas. 218
17. Citation with admission of service.
18. Stipulations and orders enlarging time for docketing of appeal and filing of record.
19. This praecipe with admission of service thereon.
20. Plaintiff-Appellee's praecipe or objections.
21. Any order which may be entered settling the transcript of record on appeal.
22. Stipulation as to record.
23. Clerk's certificate. 219

Dated, October 31, 1936.

HUGHES, SCHURMAN & DWIGHT,

By HAROLD L. SMITH,
Attorneys for Defendant-Appellant.

220 **Plaintiff-Appellee's Counter-Praecipe**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To Honorable CHARLES WEISER,
Clerk of the United States District Court for the
221 Southern District of New York:

Sir:

PLEASE incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, the following papers and exhibits in addition to the matter requested by the defendant-appellant to be included in the said record, to wit:

Stenographic transcript of the trial of said action before Hon. Alfred C. Coxe, District Judge, on June 22nd, 1936.

222

Dated: November 2nd, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee,

By IRVIN WALDMAN,
Of Counsel.

Order Settling Transcript of Record On Appeal

223

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Defendant, by an Order to Show Cause dated November 5, 1936, having moved this Court for an order settling and allowing defendant's praecipe as filed, disallowing and denying the request made in plaintiff's praecipe that the stenographic transcript of the trial be printed and directing the Clerk of this Court to incorporate in the transcript of record on appeal the papers named in defendant's praecipe, and no others, and to certify the record as so printed as a true transcript of the record of this Court in this cause, and said motion having duly come on to be heard before me in Chambers on the 6th day of November, 1936,

224

Now, upon said Order to Show Cause, the affidavit of Harold L. Smith, sworn to November 5, 1936, in support thereof, the affidavit of Irvin Waldman, sworn to November 5, 1936, in opposition thereto, the praecipe filed by defendant on October 31, 1936, the counter-praecipe filed by plaintiff on November 4, 1936, and upon all the papers and proceedings had herein, and after hearing argument of counsel, and due deliberation having been had,

225

On motion of Hughes, Schurman & Dwight, attorneys for defendant, it is

226 *Order Settling Transcript of Record on Appeal*

ORDERED that said motion be, and the same hereby is granted to the extent of settling the transcript of record on appeal on the basis of defendant's praecipe; and it is further

ORDERED that the transcript of record on appeal in this cause shall contain the papers and matters set forth in defendant's praecipe, and no others.

Dated, New York, November 12, 1936.

227 ALFRED C. COXE
U. S. D. J.

228

229

Clerk's Certificate

I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record and proceedings had in said Court in the above entitled matter, pursuant to the praecipe filed by defendant and settled and allowed by order of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York this 17th day of November, in the year of our Lord, One thousand nine hundred and thirty-six, and of the Independence of the United States the One hundred and ~~sixtieth~~ sixty-first.

230

CHARLES WEISER
Clerk.

231

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued Feb. 10, 1937. Decided March 8, 1937

No. 256

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, Appellee,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges.

Appeal by the defendant from a judgment of the District Court for the Southern District of New York in an action upon a reinsurance agreement.

Harold L. Smith, of New York City, for appellant.
Irvin Waldman, of New York City, for appellee.

L. HAND, Circuit Judge:

This appeal is from a judgment entered upon stipulated facts in an action to recover upon an agreement of reinsurance. The plaintiff is the liquidator of an insolvent surety company, and it is agreed that the agreement would cover the loss for which he sues, if it had been paid, which of course it has not and never will be. The only question is whether the defendant's promise was limited to indemnifying the reinsured—the insolvent company—for losses actually paid by it. Both sides agree that the reinsured's insured—the person suffering the loss—has no recourse over against the reinsurer, the defendant, and it follows that any recovery will be for the benefit of all the reinsured's creditors, an asset to be distributed in liquidation.

The agreement incorporated the "Standard Form of Reinsurance Agreement" adopted by the Surety Association of America on January 15, 1930, which was in turn an amendment of an earlier form, prepared in 1915. The record does not say what the Surety Association of America

was, but we do not step beyond permissible limits of judicial notice when we assume that it was a group of companies engaged in the same business as both the companies here in question. The form begins with a promise to "reinsure * * * against loss * * * as hereinafter defined," upon which follow the conditions to which "the foregoing agreement is subject." The fourth article of these provide that "the Reinsured, upon the receipt * * * of a notice of any claim or loss, * * * shall give the Reinsurer prompt written notice," but the reinsured shall decide whether it is liable for the amount, and shall settle the claim or defend against it, and its action shall conclude the reinsurer. Then follow the critical words: "The Reinsurer's proportionate share of a loss * * * shall be paid * * * upon proof of payment * * * by the Reinsured and upon delivery to the Reinsurer of copies of all essential documents con- [fol. 79] cerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss at a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date"; though the reinsurer may if it chooses pay its share direct to the insured. There are other provisions, as for example those relating to the apportionment of any collateral, which go to confirm the conclusion that the agreement did not subject the reinsurer to any liability except for a loss actually paid by the reinsured; but we need not consider them because we shall take it arguendo—and indeed we cannot see how it could be taken otherwise—that, as a new question, payment of the loss was a condition upon the reinsurer's obligation. Were it not for circumstances which seem to us conclusive, we should have felt ourselves obliged to read the promise in the defendant's sense.

The controlling fact is the decision of the Supreme Court in Allemannia Ins. Co. v. Firemen's Insurance Co., 209 U. S. 326, 28 S. Ct. 544, 545, 52 L. Ed. 815, 14 Ann. Cas. 948, in which there was a clause on whose similarity to, and difference from, the fourth article of the agreement in suit the result at bar must turn. The reinsured undertook in the tenth article of the agreement before the Supreme Court, upon receiving notice of any loss or claim promptly to advise the reinsurer, and promised that, after it had "adjusted, accepted proofs of, or paid such loss or damage, it

shall forward * * * proof of its loss and claim * * * together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss." The use of the particle, "or," seemed indeed to say that the reinsured might recover without paying the claim—that is, by only adjusting the loss or accepting proofs of it; but it is hard to see how the reinsured could in that event present a copy of a receipt for payment. Be that as it may, the eleventh article of the agreement concluded as follows: "in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the reinsured company." That certainly precluded taking the disjunctive as giving the reinsured any option. The court's general reasoning was that reinsurance was an old and familiar transaction; that its incidents were well understood; and that the authorities who had discussed it had uniformly treated the reinsurer's liability as conditional, not upon the reinsured's loss, but upon his liability. The opinion then dealt at some length with a "pro rata clause" in the eleventh article; but somewhat strangely, ignored the accompanying language which we have just quoted, and which was much more compelling. It dismissed the tenth article by italicizing the conjunction, "or," and declaring that the requirement as to forwarding a copy of the receipt was to be allocated solely to cases where the reinsured has paid. The opinion concluded that the two clauses could not mean "to entirely nullify and tear up by the roots the construction given to the contract of reinsurance for so many years throughout the civilized world and upon which its chief value is based. The nature of the contract is accurately described in its commencement. It is described as a 'compact of reinsurance;' and there has been no doubt as to the meaning of such contract for the last two centuries." 209 U. S. 326, at page 337, 28 S. Ct. 544, 548, 52 L. Ed. 815, 14 Ann. Cas. 948.

The defendant quite naturally bears heavily upon the court's reliance upon the disjunctive; and if the case at bar arose over a contract written before 1908 we might yield to that difference, regardless of the passage in the eleventh article which we have quoted, and which the court apparently did not consider; though even then the general language would remain a powerful reason the other way. But

the contract at bar was prepared long after that decision was rendered. In 1915 a new "standard form" had been prepared, as we have said; it was almost literally the same as the form of 1930; and while neither form took the agreement which had been before the Supreme Court as a model, the substance of each was the same except for the change to the copula. That difference was certainly not enough to show any change in intent, if we assume that the decision was before the draughtsmen of the form of 1915 or of 1930; for it is quite impossible that they should in that event have contented themselves with so uncertain and slight a substitution. It is not therefore a question of following the dicta [fol. 80] of an opinion; no careful draughtsmen, who wished another result, would have left so at large a document prepared for general use in all such transactions. On the other hand, it is scarcely possible to suppose that when the forms were prepared, they did not know of the decision. The record does indeed say nothing about the preparation of either form; all we know is that these companies chose to adopt it, and that it was the product of some kind of association of surety companies to which they belonged. Perhaps it goes too far to suppose that such a body acquaints itself with the decisions of every state; for this reason we forbear relying upon Globe National Fire Insurance Co. v. American Bonding & Casualty Co. (1923), 198 Iowa, 1072, 195 N. W. 728, 200 N. W. 737, 35 A. L. R. 1341, which construed the very form of 1915 adversely to the defendant, though it is probable that that decision also was known. But to say that the only decision of the Supreme Court upon the point was not known or was not regarded, seems to us to pass any reasonable possibility.

The defendant seems to think that the result unjustly enriches the plaintiff; but this is not true. It does indeed go to swell the funds available to pay its creditors in general, but by no chance can the shareholders profit. The defendant certainly did undertake to accept the hazard of the loss, and why it should be able to interpose as a condition the continued ability of the reinsured to meet its part of the obligations, is not clear. Of course if it so stipulated, it may insist; but it must stand upon its contract, no general considerations of equity make in its favor.

Judgment affirmed.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of March, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

LOUIS H. PINK, as Superintendent, etc., Plaintiff-Appellee,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 82] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Louis H. Pink, as Supt., etc., vs. Fidelity & Deposit Company of Maryland. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1937. William Parkin, Clerk.

[fol. 83] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 82, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Louis H. Pink

as Superintendent, etc., Plaintiff-Appellee, against Fidelity & Deposit Company of Maryland, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fourteenth day of April, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S
FILED
MAY 1 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RALPH S. HARRIS,
HAROLD L. SMITH,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Petitioner,* *vs.* LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION

To the Honorable, the Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows:

STATEMENT

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to

review a decision affirming a final judgment of the United States District Court for the Southern District of New York in favor of respondent in an action brought by respondent against petitioner upon a written agreement.

This is a test case involving the construction of a standard form of reinsurance agreement adopted by the Surety Association of America and in general use. Certain language in this standard form makes payment by the reinsured of the loss under the bond with respect to which reinsurance is effected a condition precedent to recovery of reinsurance. The Circuit Court of Appeals sustained a recovery of reinsurance although the loss under the bond had not been paid, because it believed that such a decision was required by *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, a case construing an entirely different form of agreement (R. 79). We submit that the *Allemannia* case cannot control the question of construction here because that case does not establish an arbitrary rule that parties to a reinsurance agreement cannot make payment of the loss a condition precedent. While the *Allemannia* case has not been expressly invoked for such an arbitrary rule, some courts have manifested a tendency to regard that case as an authority which dispenses with the necessity of examining the particular agreement to determine whether the parties intended to make payment a condition precedent. Review by certiorari is appropriate for this reason, as well as for the reason that this is an important test case turning upon the effect to be given to the *Allemannia* case. (See pp. 10-11, *infra.*)

By the agreement sued upon, which incorporates the standard form of reinsurance agreement, petitioner reinsured Southern Surety Company of New York, hereinafter

called "Southern", against loss under a fidelity bond issued by Southern (R. 21-22, 48, 41, 47, 19-20, 33-40).

Southern, the reinsured, became liable on the bond in the amount of $7,045.41 (R. 20-21). This liability has not been paid and never will be paid in full because Southern is insolvent and even if it recovers in this case it will pay on account of the loss on the bond only a dividend in the same proportion as it pays on other general claims (R. 22-23).

Respondent, as liquidator of Southern, sued for reinsurance in the amount of one-half of Southern's liability, one-half being the proportion in which reinsurance was effected (R. 8-10, 48).

Concededly, the case does not involve any special right of the creditor to which Southern is liable under the bond because that creditor is merely a general creditor of Southern and would have no lien upon or preferred claim to any reinsurance recovered. The controversy merely concerns the right of respondent, as liquidator of Southern, to recover reinsurance under the standard form for the benefit of general creditors without paying the loss under the bond.

A jury was waived and the action was tried upon an agreed statement of facts which was adopted by the District Court as its special findings of fact (R. 15-50).

The District Court gave judgment for respondent and the judgment was affirmed by the Circuit Court of Appeals (R. 59, 82).

The standard form which is involved in the present case reinsures the reinsured "against loss" as follows:

> "IN CONSIDERATION of the premium payable under section 1 hereof hereinafter called the REINSURER, does hereby reinsure hereinafter called the REINSURED,

> under bond numbered , together with all riders attached thereto, hereinafter called the BOND, issued by the Reinsured in the penalty of Dollars, in favor of (obligee), and in behalf of hereinafter called the Principal, *against loss* thereunder and against costs and expenses, as hereinafter defined, and interest." (R. 47, lines 1-9). (Italics ours.)

Then follow fifteen sections setting forth the conditions of the agreement (R. 47, lines 11-192). Section 4 contains a provision which makes payment by the reinsured of the loss under the bond a condition precedent to recovery of reinsurance. This provision follows:

> "The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured *upon proof of the payment* of such items *by the Reinsured,* and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof." (R. 47, lines 72-74). (Italics ours.)

The agreement in *Allemannia Ins. Co.* v. *Firemen's Ins. Co.,* 209 U. S. 326, which the Circuit Court of Appeals deemed to be controlling here, does not, as does the standard form involved here, reinsure expressly *against loss,* or contain a clear and explicit provision requiring payment of reinsurance *upon proof of the payment by the reinsured.* A copy of the *Allemannia* agreement is set forth in the Appendix. The *Allemannia* agreement, instead of reinsuring *against loss,* merely reinsures the reinsured *under its policies* as follows:

> "By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, *hereby agrees to reinsure* the Firemen's Insurance Company of Baltimore, Maryland, *under its policies,* renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided * * *." (Appendix, p. i.) (Italics ours.)

The *Allemannia* agreement has no provision corresponding with the provision of the standard form involved here requiring payment of reinsurance *upon proof of payment.* The provisions of the *Allemannia* agreement which are deemed by the Circuit Court of Appeals in its opinion in this case to make the *Allemannia* case controlling are as follows:

> "10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and upon request, shall exhibit and permit copies to be made

of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable prorata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof" (Appendix, pp. iv-v).

The Circuit Court of Appeals would have held that under the standard form here involved payment by the reinsured of the loss under the bond is a condition precedent to recovery of reinsurance but for the decision in the *Allemannia* case. It refers in its opinion to the provision in Section 4 of the standard form involved here which requires payment of the reinsurance "upon proof of the payment" by the reinsured as the "critical words" and says:

> "* * * There are other provisions, as for example those relating to the apportionment of any collateral, which go to confirm the conclusion that the agreement did not subject the reinsurer to any liability except for a loss actually paid by the reinsured; but we need not consider them because we shall

take it arguendo—and indeed we cannot see how it could be taken otherwise—that, as a new question, payment of the loss was a condition upon the reinsurer's obligation. Were it not for circumstances which seem to us conclusive, we should have felt ourselves obliged to read the promise in the defendant's sense.

The controlling fact is the decision of the Supreme Court in *Allemannia Ins. Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326, 28 S. Ct. 544, 545, 52 L. Ed. 815, 14 Ann. Cas. 948, in which there was a clause on whose similarity to, and difference from, the fourth article of the agreement in suit the result at bar must turn * * *." (R. 79.)

The reasoning in subsequent portions of the opinion indicates that the conclusion of the Circuit Court of Appeals that the present case is governed by the *Allemannia* case rests upon two alternative lines of reasoning, the first of which treats the *Allemannia* case as a controlling precedent and the second of which treats that case as a controlling fact bearing upon the intention of the parties.

In its first line of reasoning the Circuit Court of Appeals refers to the provision in Section 10 of the *Allemannia* agreement quoted above (*supra*, p. 5) to the effect that after the reinsured shall have "adjusted, accepted proofs of, *or* paid" the loss it shall forward to the reinsured a proof of its loss and claim, together with a copy of the original proofs and claim "and a copy of the original receipt taken upon the payment of such loss", and the provision in Section 11 (*supra*, p. 6) to the effect that "in no event shall this Company [the reinsurer] be liable for an amount in excess of a ratable proportion of the sum *actually paid* * * * by the said reinsured Company * * *" (R. 79-80).

The Circuit Court of Appeals observes that the use of the particle, "or", in Section 10 "seemed indeed to say that the reinsured might recover without paying the claim—that is, by only adjusting the loss or accepting proofs of it * * *", but says that the language of Section 11 "certainly precluded taking the disjunctive as giving the reinsured any option" (R. 80). It points out that the general reasoning of the opinion in the *Allemannia* case concerned the nature, incidents and meaning of reinsurance in general and that that opinion "somewhat strangely, ignored" and "apparently did not consider" the language of Section 11 quoted above (R. 80). This apparently implies that because words in the *Allemannia* agreement which confined the liability of the reinsured to a proportion of the sum "actually paid" by the reinsured were disregarded in reaching the decision in the *Allemannia* case, the words in the standard form involved here which condition the reinsurer's liability upon proof of payment by the reinsured should likewise be disregarded.

With respect to this line of reasoning of the Circuit Court of Appeals petitioner contends (1) that proof of payment by the reinsured is made a condition precedent by the plain meaning of the language of the standard form (*infra*, pp. 13-16), (2) that nothing in the *Allemannia* case requires that this plain meaning be disregarded (*infra*, pp. 17-18) and (3) that no rule of law requires that this plain meaning be disregarded (*infra*, pp. 19-20).

The second line of reasoning of the Circuit Court of Appeals is based upon a chain of assumptions, partly expressed and partly implied, as follows: (1) that the draughtsmen of the standard form involved here, which was adopted by the Surety Association of America in 1930,

and of an antecedent form adopted by the same association in 1915 had knowledge of the *Allemannia* case, (2) that draughtsmen with such knowledge would have used different language if they had intended the standard form to make proof of payment by the reinsured a condition precedent, (3) that when Southern and petitioner incorporated the standard form into the agreement sued upon the intention of the draughtsmen of the standard form was imputable to them, and, therefore, (4) that Southern and petitioner did not intend to make proof of payment by the reinsured a condition precedent (R. 81). No evidence of intention was introduced or offered (R. 16-24). The record does not contain any evidence or finding that the draughtsmen, who are not even identified, had knowledge of the *Allemannia* case or had any relation to Southern or petitioner (R. 18-24).

With respect to this line of reasoning of the Circuit Court of Appeals petitioner contends that the Court's conclusion as to the intention of the parties is erroneous because it is inconsistent with the plain meaning of the language used and the assumptions upon which it is based are not supported by any evidence (*infra*, pp. 20-22).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred

1. In holding that respondent can recover reinsurance under the agreement sued upon without paying the loss on the bond with respect to which the reinsurance was effected;

2. In holding that payment by the reinsured of the loss under the bond is not a condition precedent to respond-

ent's right to recover reinsurance under the agreement sued upon;

3. In holding that the agreement sued upon is an agreement of indemnity against liability;

4. In applying the decision in *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, case as a controlling precedent;

5. In giving to the agreement sued upon a construction based upon certain assumptions of fact which are inconsistent with the plain meaning of the language of the agreement and are unsupported by any evidence.

REASONS FOR GRANTING THE WRIT

1. This is an important test case which should be determined by this Court. It involves construction of a standard form of reinsurance agreement adopted by the Surety Association of America (R. 24). A great many insurance companies in different parts of the country have outstanding reinsurance agreements which incorporate this standard form and therefore the question involved here is of great general importance. The same question has been raised in connection with claims asserted by respondent, as a liquidator, against several of these companies. For this reason the present case was instituted as a test case. The case will not be a satisfactory test case unless decided by this Court because it turns upon the question whether the decision in *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, requires a construction of the standard form inconsistent with its plain language (see pp. 6-9), *supra*, and attached brief), and only a determination of that

question by this Court will be recognized as authoritative in all other cases.

2. This case turns upon the effect to be given the decision in the *Allemannia* case. (See pp. 6-9, *supra.*) We submit that the Circuit Court of Appeals has erroneously applied that decision as a controlling precedent for holding that the reinsured can recover reinsurance under the standard form of reinsurance agreement without paying the loss on the bond. (See pp. 6-9, *supra,* and attached brief.)

3. Some cases involving construction of reinsurance agreements decided since the *Allemannia* case disclose a tendency to regard the *Allemannia* case as establishing a rule of law governing all such cases regardless of the language used to express the conditions of the reinsurer's obligation. See *Globe Nat. Fire Ins. Co.* v. *American Bonding & Casualty Co.,* 198 Iowa 1072, 1076, 195 N. W. 728, 729 (discussed, *infra,* p. 20); *Providence-Wash. F. Ins. Co.* v. *Atlanta-B. Mut. F. Ins. Co.,* 166 Fed. 548, 553 (C. C., N. D. Ga.); *French Mut. General Soc.* v. *United States F. & G. Co.,* 203 Fed. 558, 566 (D. C., D. Md.). This tendency is evident in both of the opinions below (R. 56, 79-81). We respectfully urge that this Court review the present case in order that a misconception of the decision in the *Allemannia* case, gradually becoming widespread, may be corrected.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directing the Circuit Court of Appeals for the Second Circuit to certify and send to this Court for its review and determina-

tion a full and complete transcript of the record and all proceedings in the case of Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, Plaintiff-Appellee, against Fidelity & Deposit Company of Maryland, Defendant-Appellant, and that the judgment herein of the Circuit Court of Appeals for the Second Circuit be reversed and that petitioner have such further relief as to this Court may seem proper.

Dated, New York, April 30, 1937.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

By RALPH S. HARRIS,
HAROLD L. SMITH,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 78) is reported in 88 F. (2d) 630.

The opinion of the United States District Court for the Southern District of New York (R. 54) is reported in 15 F. Supp. 715.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937 (R. 82). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE AND SPECIFICATION OF ERRORS

The statement of the case and the specification of errors are contained in the petition.

ARGUMENT

I.

PROOF OF PAYMENT BY THE REINSURED OF THE LOSS UNDER THE BOND IS MADE A CONDITION PRECEDENT BY THE PLAIN MEANING OF THE LANGUAGE OF THE STANDARD FORM.

The provision of the standard form of reinsurance agreement involved in this case which requires payment

of the reinsurer's share of the loss under the bond and of costs, expenses and interest "upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof" (R. 47, lines 72-74) literally makes proof of payment by the reinsured a condition precedent. The word "upon" is commonly used to express the dependence of an obligation upon a condition. *Leeper Bros. Lumber Co.* v. *Gunter,* 61 Okla. 122, 160 Pac. 606; *Welch* v. *Matthews,* 98 Mass. 131; *Courtright* v. *Deeds,* 37 Iowa 503; *Casey* v. *Metropolitan Life Insurance Co.,* 123 Misc. 224, 204 N. Y. Supp. 199; *Mascioni* v. *Miller Inc.,* 261 N. Y. 1, 4, 184 N. E. 473, 474; *Amies* v. *Wesnofske,* 255 N. Y. 156, 161, 162, 174 N. E. 436, 437, 438. The words "upon proof of the payment" etc. correspond with the common "proof of loss" clause, the effect of which is to make the proof of loss a condition precedent to the obligation to pay insurance. *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489; *Strang* v. *Prudential Ins. Co.,* 263 N. Y. 71, 188 N. E. 161; *Fink* v. *Catholic Order of Foresters,* 161 Minn. 70, 200 N. W. 809; *Connecticut General Life Ins. Co.* v. *Williams,* 87 S. W. (2d) 807 (Tex. Civ. App.); *Vecchio* v. *Metropolitan Life Ins. Co.,* 224 App. Div. 301, 230 N. Y. Supp. 131; *Moriarty* v. *Tomlinson,* 58 S. D. 431, 235 N. W. 363. See 33 C. J. 7-8, 74-75.

The sentence immediately following the words "upon proof of the payment" etc. makes an exception, giving the reinsured the right to give the reinsurer written notice of its intention to pay the loss on a certain date and require payment of the reinsurance by such date (R. 47, lines 74-79). The very existence of this exception, which is not

applicable here because no such notice has been given, shows that the words quoted above were intended to express a condition precedent.

There are other provisions of the standard form which show that the reinsured cannot recover without making payment as follows:

(1) The reinsurer agrees to "reinsure * * * against loss" (R. 47, lines 3, 9). An agreement to reinsure is an agreement of indemnity. See 28 Harv. L. Rev. 302; *Ill. Mut. Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362, 363, 365; *Royal Ins. Co.* v. *Vanderbilt Ins. Co.*, 102 Tenn. 264, 267, 270, 52 S. W. 168, 169, 170; *Allison* v. *Fidelity Mutual Fire Ins. Co.*, 81 Neb. 494, 497-498, 116 N. W. 274, 275. Therefore, the words *"reinsure * * * against loss"* mean *"indemnify * * * against loss"* and show that the reinsured cannot recover without making payment because an agreement to indemnify against loss, made with reference to a possible claim by a third party against the indemnitee, merely indemnifies against payment of the claim. *Van Schaick* v. *Burney*, 145 Misc. 887, 260 N. Y. Supp. 849, aff'd 237 App. Div. 812, 260 N. Y. Supp. 979; *National City Bank* v. *Berwin*, 240 App. Div. 550, 270 N. Y. Supp. 678; *Barsuk* v. *Independence Indemnity Co.*, 236 App. Div. 162, 258 N. Y. Supp. 148; *State* v. *Mills*, 23 N. M. 549, 169 Pac. 1171. See *MacArthur Brothers Co.* v. *Kerr*, 213 N. Y. 360, 364-366, 107 N. E. 572, 573-574.

(2) It is agreed that the reinsurer shall have a one-half share of the proceeds of any collateral available to the reinsured in connection with the bond (R. 47, lines 124-125, 16-20; R. 48). This shows that the reinsurer's obligation is

merely to pay one-half of the amount paid by the reinsured, for the obvious purpose is to give the parties proportionate reimbursement for their respective contributions to this amount, and the equal division of the collateral would effect this purpose only if the contributions were equal.

(3) It is agreed that the reinsured shall bear a certain portion of its risk without reinsurance (R. 47, line 22 *et seq.*). The obvious purpose of this is to give assurance to the reinsurer that the reinsured will always have a substantial interest which will impel it diligently to resist unfounded claims. To permit a liquidator of an insolvent reinsured to recover reinsurance without paying the loss would deprive the reinsurer of this protection, invite perfunctory and ineffective resistance to unfounded claims and open the door to fraud, because the insolvent estate could realize a profit by conceding liability for unfounded claims whenever the reinsurance would exceed the amount which the liquidator would pay to the company insured under the bond as a general creditor. Furthermore, to permit the realization of a profit out of the reinsurance would be inconsistent with the fundamental principle of insurance. See *Castellain* v. *Preston,* 11 Q. B. D. 380, 386; *British Dominions General Ins. Co., Ltd.* v. *Duder,* [1915] 2 K. B. 394, 401, 403; *Ill. Mut. Fire Ins. Co.* v. *Andes Ins. Co.,* 67 Ill. 362, 363-364; 29 Harv. L. Rev. 102; 28 Harv. L. Rev. 302.

II.

NOTHING IN THE *ALLEMANNIA* CASE REQUIRES THAT THE PLAIN MEANING OF THE LANGUAGE MAKING PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT BE DISREGARDED.

In the *Allemannia* case it was pointed out that the only question in a case of this sort "is as to the construction of the language of the reinsurance compact" (209 U. S., pp. 331-332). In such a case, prior decisions are precedents only to the extent that they construe similar language. See *In re Whitney's Estate,* 171 Cal. 750, 760, 154 Pac. 855, 859; *Sandberg v. Margold Realty Corp.,* 256 N. Y. 228, 231, 176 N. E. 175, 176; *In re Oppenheimer's Estate,* 73 Mont. 560, 570, 571, 238 Pac. 599, 601.

The *Allemannia* decision is not a precedent because it does not construe any language similar to the words of the standard form requiring payment of reinsurance "upon proof of the payment" by the reinsured, or the words reinsuring the reinsured "against loss". (See pp. 4-6, *supra.*)

The fact that the decision in the *Allemannia* case did not give effect to the plain meaning of the words which, literally, confined the liability of the reinsurer to a proportion of the sum "actually paid" by the reinsured does not require that here the plain meaning of the words which make proof of payment by the reinsured a condition precedent be disregarded. In the *Allemannia* case it was necessary to resolve a patent ambiguity. If the words "actually paid" had been taken literally they would have been inconsistent with the words requiring proof of loss by the reinsured "after said reinsured Company shall have adjusted, ac-

cepted proofs of, *or* paid such loss" (see pp. 7-8, *supra*). Here there is no ambiguity and to disregard the plain meaning of the words "upon proof of the payment" and the words "reinsure * * * against loss" would create, not resolve, ambiguity. Under such circumstances the plain meaning of words cannot be disregarded. See *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 491-492; *Harrison* v. *Fortlage*, 161 U. S. 57, 63; *Henrietta Mills* v. *Commissioner of Internal Revenue*, 52 F. (2d) 931, 934 (C. C. A., 4th).

In the *Allemannia* case it was assumed that reinsurance would lose its chief value unless construed so as to enable the reinsured to discontinue business without keeping sufficient funds on hand to pay losses before collecting reinsurance (209 U. S., pp. 334-337). We respectfully submit that this assumption overlooks the fact that companies make reinsurance agreements in such form as to accomplish their particular purposes. Agreements like the standard form are designed to diversify the risks of a going business (R. 41-43, 47), whereas, when insurers desire to discontinue business, they make agreements involving such features as novation or assumption of risk whereby they relieve themselves from the necessity of adjusting and paying claims. *Cf. Glen* v. *The Hope Mutual Life Ins. Co.*, 56 N. Y. 379; *People ex rel. Kane* v. *National Surety Co.*, 68 Colo. 231, 188 Pac. 653; *E. D. Baird & Son* v. *Kaskaskia Live Stock Ins. Co.*, 198 Iowa 905, 200 N. W. 575; *Empire Life Ins. Co.* v. *Landman*, 213 Ala. 248, 104 So. 425. Such agreements are in a distinct category of their own. See *People* v. *American Central Ins. Co.*, 179 Mich. 371, 375-376, 146 N. W. 235, 237; *American Bonding Co.* v. *American Surety Co.*, 127 Va. 209, 219-221, 103 S. E. 599, 602.

III.

NO RULE OF LAW REQUIRES THAT THE PLAIN MEANING OF THE LANGUAGE MAKING PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT BE DISREGARDED.

Numerous decisions in this country, some before and some after the *Allemannia* case, have affirmed or assumed a "rule" to the effect that the reinsured can recover reinsurance without paying the loss where the particular reinsurance agreement fails to make payment of the loss a condition precedent. *Hone* v. *The Mutual Safety Insurance Company,* 1 Sandf. 137, aff'd 2 N. Y. 235; *Norwood* v. *Resolute Fire Insurance Co.,* 47 How. Pr. (N. Y.) 43; *Ex Parte Norwood,* 3 Biss. 504, Fed. Cas. 10,364 (D. C., N. D. Ill.); *Cashau* v. *Northwestern National Ins. Co.,* 5 Biss. 476, Fed. Cas. No. 2,499 (C. C., E. D. Wis.); *Blackstone* v. *Alemannia Fire Ins. Co.,* 56 N. Y. 104; *Consolidated Real Estate & Fire Ins. Co.* v. *Cashow,* 41 Md. 59; *Fame Ins. Co.'s Appeal,* 83 Pa. St. 396; *Providence-Wash. F. Ins. Co.* v. *Atlanta-B. Mut. F. Ins. Co.,* 166 Fed. 548 (C. C., N. D. Ga.); *French Mut. General Soc.* v. *United States F. & G. Co.,* 203 Fed. 558 (D. C., D. Md.), rev'd on other grounds, 212 Fed. 620 (C. C. A., 4th), certiorari denied, 234 U. S. 758; *Hicks* v. *Poe,* 269 U. S. 118, aff'g 293 Fed. 766 (C. C. A., 4th), which affirmed without opinion 276 Fed. 949 and 293 Fed. 764 (D. C., D. Md.); *Republic Metalware Co.* v. *Gen. Reinsurance Corp.,* 245 App. Div. 232, 281 N. Y. Supp. 5, modified, 245 App. Div. 907, 282 N. Y. Supp. 993.

But none of these cases involved any language similar to that involved here.

A prior standard form of reinsurance agreement substantially like the one involved here was, however, involved in *Globe Nat. Fire Ins. Co.* v. *American Bonding & Casualty Co.*, 198 Iowa 1072, 195 N. W. 728. There the Iowa Court said, by way of *dictum*, that the receiver of the reinsured could recover reinsurance for the benefit of general creditors without paying the loss on the bond. It rested this *dictum* upon an assumed "well settled rule" and did not devote one word to consideration of the language of the standard form corresponding with that referred to above.

The same tendency to seek a "rule" in prior decisions instead of seeking the parties' intention in the language of the agreement is manifest in several of the other cases cited above. Obviously, however, the only rule to be derived from the cases is that payment by the reinsured is not a condition precedent unless made such by the reinsurance agreement. In every case involving construction of an agreement, the meaning of the words used must control.

IV.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE PARTIES TO THE AGREEMENT SUED UPON DID NOT INTEND TO MAKE PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT IS ERRONEOUS BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE LANGUAGE OF THE AGREEMENT AND THE ASSUMPTIONS UPON WHICH IT IS BASED ARE NOT SUPPORTED BY ANY EVIDENCE.

The conclusion of the Circuit Court of Appeals that the parties did not intend to make proof of payment by the

reinsured a condition precedent is erroneous because it is inconsistent with the plain meaning of the language of the agreement (see pp. 13-16, *supra*), and that plain meaning cannot be disregarded in favor of an unexpressed intention. See *Calderon* v. *Atlas Steamship Company,* 170 U. S. 272, 280; *Hawkeye Commercial Men's Ass'n* v. *Christy,* 294 Fed. 208, 213-214 (C. C. A., 8th); *National Pub. Co.* v. *International Paper Co.,* 269 Fed. 903, 904 (C. C. A., 2d).

The Court's conclusion as to the intention of the parties is erroneous for the additional reason that it rests upon a chain of assumptions which are not supported by any evidence. (See pp. 8-9, *supra.*) The Court could not properly find an intention of the parties on the basis of its series of unsupported inferences, first, that some unidentified draughtsmen of the standard forms had knowledge of the *Allemannia* case, second, that these draughtsmen therefore had a certain intention, and, third, that these draughtsmen had such relation to Southern and petitioner as to justify imputing their intention to these parties. Necessary facts cannot be found by thus piling inference upon inference. See *United States* v. *Ross,* 92 U. S. 281, 283-284; *Manning* v. *Insurance Co.,* 100 U. S. 693, 697-699; *United States F. & G. Co.* v. *Des Moines Nat. Bank,* 145 Fed. 273, 279 (C. C. A., 8th). The lacking evidence that the draughtsmen had knowledge of the *Allemannia* case is not supplied by the rule that everyone is presumed to have knowledge of the law because that rule does not suffice to establish such knowledge where the existence of such knowledge must be established as a material fact. *Caffey* v. *Tindall,* 99 Miss. 851, 56 So. 177; *Murphy* v. *Sheftel,* 121 Cal. App. 533, 9 P. (2d) 568; *Municipal Metallic Bed Mfg. Corp.* v. *Dobbs,* 253 N. Y. 313, 171 N. E. 75. Finally it is not reason-

able to assume that draughtsmen with knowledge of the *Allemannia* case would have used different language if they had intended that proof of payment be a condition precedent, for they chose language most appropriate for this purpose. (See pp. 13-16, *supra.*) It is far more cogent to conclude that if they had not intended such a condition precedent they would never have used the language of a condition precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH S. HARRIS
HAROLD L. SMITH,
Counsel for Petitioner.

Appendix

Reinsurance Compact.

The Allemannia Fire Insurance Company of Pittsburg, Pa., With the Firemen's Insurance Company of Baltimore, Maryland.

By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, hereby agrees to reinsure the Firemen's Insurance Company of Baltimore, Maryland, under its policies, renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided, by *The Allemannia Fire Insurance Company of Pittsburg, Pa., it Being Understood and Mutually Agreed* that each entry or certificate under this compact shall be made, issued and subject to and governed by the following terms, Conditions, and Stipulations:

Prohibitions, Lines and Limits.

1. Entries under this compact shall not be made to reinsure any portion of any contract covering risks prohibited in the list of *prohibited risks,* lines and limits furnished said Firemen's Insurance Company of Baltimore, Maryland, by this Company, and entries covering any risk or class of risks limited, shall not be binding for a sum in excess of the limits therein named, and entries shall not be binding for a sum exceeding the line or amount retained and carried by the said reinsured Company at its own risk, without other reinsurance, under its contracts covering property, in or on the same building or risk, in

or on which the contracts so reinsured may cover, and in or *on others next adjacent thereto or connected therewith.*

2. It being further understood, that when by cancellations of contracts, at request of the assured, or reinsured or by transfer to cover in another location, or by expiration of contracts, whereby the said reinsured Company may be left with a line of amount pending at its own risk of less than the amount reinsured, or without any contract so pending excepting that which may be reinsured *such entries shall not be invalidated thereby.*

AD-INTERIM ENTRIES.

3. *Ad-interim* or covering entries under this compact may be made to reinsure and cover such excess lines or risks, not prohibited and not to exceed the limits above referred to, as said reinsured Company may accept and insure or reinsure under its contracts.

4. Provided that on the day of such covering entry the said Firemen's Insurance Company as aforesaid of said reinsured Company shall mail to the said Allemannia Fire Insurance Company at Pittsburg, Pa., an advice or covering report of the number, amount and date of such entry, and state therein the name of reinsured, location, kind or class or risk covered, and the amount it may then have pending thereon.

5. The intention herein being, that this Company shall protect the said reinsured Company, in the manner herein provided, upon such excess lines, from the date they are covered under the contracts of said reinsured Company, until full reports of the same, may by it, be received, and such entries being fully reported to this Company as hereinafter provided, and in no event shall any *ad-interim* entry remain open or be binding *upon this Company for a longer period than fifteen days from the date thereof.*

Reinsurance Reports.

6. Each entry under this compact, and each cancellation, closing notice, endorsement or change that may refer to or change the ownership, location, or premium of the contract or risk hereunder reinsured, of which the said reinsured Company may have received notice at its office at Baltimore, Maryland, shall be promptly reported to this Company upon blanks provided for that purpose, and each of such reports shall contain a copy of the contract hereunder reinsured, and of the endorsements or changes herein referred to, and the amount, rate, premium, term and expiration of such contracts, or of the reports of same made to said reinsured Company by the parties issuing or making the same.

7. Full and regular reports as above, shall also be made to replace each advice or covering report and complete each *ad-interim* entry that may have been made under this Compact, within five days after said reinsured Company shall have received at its office at Baltimore, Maryland, a full report of the contract reinsured *ad-interim,* and in no event shall such full and regular reports be delayed beyond a period of fifteen days from the date of such *ad-interim* entry, otherwise, the same shall be deemed to have been terminated or rendered void; and all of the reports above referred to shall be lodged or filed with this Company and made a part of the entry to which they refer or pertain.

8. Each entry under this Compact shall be binding, commence, or take effect at 12 o'clock noon, of the day on which the reports herein referred to are mailed, addressed to the Allemannia Fire Insurance Company, at Pittsburg, Pa., and duly postmarked at the Post-office in the City of Baltimore, Maryland.

Cancellation of Entries.

9. This Company may decline any entry under this Compact, or cancel or terminate any entry by notifying the within named Firemen's Insurance Company, of said reinsured Company of its desire so to do, and refunding or tendering a pro-rata proportion of the reinsurance premium paid therefor, in which case the said reinsured Company shall be allowed ten days from the date of such notice within which to complete such cancellation, and the said reinsured Company may cancel and terminate any entry by allowing this Company the customary short rate proportion of the reinsurance premium thereon. It being understood that when any contract of said reinsured Company, hereunder reinsured, is cancelled at pro-rata rates, then this Company will refund at pro-rata proportion of the reinsurance premium received upon the entry reinsuring the same, also that a ratable proportion of any commission or other allowance made upon any reinsurance premium shall be deducted from the amount of unearned or returned premium, and the net balance only be returnable to said reinsured Company.

Losses and Loss Expenses.

10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original

proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof.

12. This Company shall reimburse the said reinsured Company for a ratable proportion of all actual expenses, legal and otherwise, incurred by said reinsured Company in adjusting, resisting or investigating any claim for loss under its contracts hereunder reinsured, or allowed by it therefor upon receiving a statement or account of said expenses.

Accounts and Allowances.

13. The said Officers of the said reinsured Company shall render to the said Allemannia Fire Insurance Company at Pittsburg, Pa. not later than the fifteenth day of each calendar month, a statement of all entries, or certificates of reinsurance made or issued under this Compact during the immediately preceding month, and shall accompany the

same with an account current exhibiting the amount of reinsurance premiums as shown by said statement, and a remittance by check to order of said Allemannia Fire Insurance Company, to cover the amount of same, after deducting therefrom, the amount of cancelled or returned reinsurance premiums reported during the same month, and from the balance thus obtained 30% and 10% contingent per centum to cover commissions and all expenses excepting loss expenses.

TERMINATION OF CONTRACT.

14. This compact of reinsurance may be discontinued and terminated by either Company herein named, upon its giving thirty days' notice in writing to the other, and in the event of such discontinuance and termination of this Compact, all risks previously reinsured and accepted hereunder, shall remain in full force and effect until the expiration or cancellation of the original contracts, reinsured, unless otherwise mutually agreed.

AD-INTERIM RENEWALS.

15. It is hereby understood and agreed that whenever contracts of the Firemen's Insurance Company, reinsured by any single policy, or by entries under this compact, or any policy of this Company, is continued beyond expiration or termination by said reinsured Company, either by a renewal, agreement, or a new policy, or entry upon the same risk for the same amount as the expired or terminated contract so reinsured, such single policies or entries under said Compact or policies shall be considered as continuing and binding, *ad-interim,* for a period of not exceeding twenty days from the date of their expiration, in the same proportion and manner as they originally applied to such reinsured contracts. Provided that said reinsured Com-

pany shall mail to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., as provided in said Compact, a full report of the entry made to continue the reinsurance of such contracts as may be renewed or rewritten within five days after it shall receive notice of a renewal or continuation of such contracts, at its office at Pittsburg, Pa., and within twenty days after the expiration of said reinsurance policies or entries so continued, otherwise such *ad-interim* reassurances shall be void and of no effect.

IN WITNESS WHEREOF, this Company has caused these presents to be signed by its President and Secretary, in the City of Pittsburg, State of Pennsylvania, on this 8th day of June in the year eighteen hundred and ninety-five.

JOS. ABEL, *President.*

G. W. HAMMER, *Secretary.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937
No. 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

RALPH S. HARRIS,
HAROLD L. SMITH,
E. MYRON BULL,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Petitioner,* *vs.* LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, *Respondent.*	No. 38

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

This case is here on writ of certiorari granted June 1, 1937 to review a decision of the United States Circuit Court of Appeals for the Second Circuit affirming a final judgment of the United States District Court for the Southern District of New York in favor of respondent in an action brought by respondent against petitioner upon a written agreement.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 78) is reported in 88 F. (2d) 630 and the opinion of the District Court for the Southern District of New York (R. 54) is reported in 15 F. Supp. 715.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937 (R. 82). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT

This is a test case the sole issue in which is the correct construction of a standard form of reinsurance agreement.

The agreement sued upon was made by Southern Surety Company of New York, hereinafter called "Southern", and petitioner. Southern having issued a fidelity bond, Southern and petitioner executed a memorandum by which petitioner reinsured Southern (R. 19-20, 33, 21, 48). This memorandum made the reinsurance subject to a general reinsurance agreement in force between the parties (R. 48, 41). The general reinsurance agreement made all reinsurance between the parties subject to the standard form of reinsurance agreement adopted by the Surety Association of America on January 15, 1930, a copy of which was attached to the agreement (R. 41-42, 47).

By provisions of this standard form, which are hereinafter set forth (*infra*, p. 4), petitioner reinsured Southern "against loss" under the bond, and agreed to pay reinsurance "upon proof of the payment" by Southern of

the loss under the bond. Petitioner contends that by reason of these provisions payment by Southern of the loss under the bond is a condition precedent to recovery of reinsurance.

Southern, the reinsured, became liable on the bond in the amount of $7,045.41 (R. 20-21). This liability has not been paid and never will be paid in full because Southern is insolvent and even if recovery is allowed in this case Southern will pay on account of the loss under the bond only a dividend in the same proportion as it pays on other general claims (R. 22-23).

Respondent, as liquidator of Southern, sued for reinsurance in the amount of one-half of Southern's liability, one-half being the proportion in which reinsurance was effected (R. 8-10, 48).

A jury was waived and the action was tried upon an agreed statement of facts which was adopted by the District Court as its special findings of fact (R. 15-50).

The District Court gave judgment for respondent and the judgment was affirmed by the Circuit Court of Appeals (R. 59, 82).

The case does not involve any special right of the obligee to which Southern is liable under the bond because that obligee is merely a general creditor of Southern and would have no lien upon or preferred claim to any reinsurance recovered.[1] The controversy merely concerns the right of respondent, as liquidator of Southern, to recover reinsur-

---

[1]This is conceded (R. 23), and is well settled. See *Morrow* v. *Burlington Basket Co.*, 66 S. W. (2d) 746, 749 (Tex. Civ. App.); *United States* v. *Federal Surety Co.*, 72 F. (2d) 964, 967 (C. C. A. 4th), certiorari denied 294 U. S. 711; *Insurance Co. of Penn.* v. *Park & Pollard Co.*, 190 App. Div. 388, 393 (1st Dept.), aff'd 229 N. Y. 631; *Glen* v. *Hope Mutual Life Ins. Co. of N. Y.*, 56 N. Y. 379, 382.

ance under the standard form of reinsurance agreement for the benefit of general creditors without paying the loss under the bond.

The standard form of reinsurance agreement reinsures the reinsured "against loss" as follows:

> "IN CONSIDERATION of the premium payable under section 1 hereof hereinafter called the REINSURER, does hereby reinsure hereinafter called the REINSURED, under bond numbered , together with all riders attached thereto, hereinafter called the BOND, issued by the Reinsured in the penalty of Dollars, in favor of (obligee), and in behalf of hereinafter called the Principal, *against loss* thereunder and against costs and expenses, as hereinafter defined, and interest." (R. 47, lines 1-9.) (Italics ours.)

Then follow fifteen sections setting forth the conditions of the agreement (R. 47, lines 11-192). Section 4 requires payment of the reinsurance "upon proof of the payment" by the reinsured of the loss under the bond as follows:

> "The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured *upon proof of the payment* of such items *by the Reinsured,* and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs *and the payment thereof.*" (R. 47, lines 72-77.) (Italics ours.)

The Circuit Court of Appeals sustained a claim for reinsurance in this case under the standard form of reinsur-

ance agreement although the loss under the bond had not been paid, because the court believed that such a decision was required by *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326 (R. 79).

The Circuit Court of Appeals indicated in its opinion that it would have held that payment by the reinsured of the loss under the bond is a condition precedent to recovery of reinsurance but for the decision in the *Allemannia* case. It refers in its opinion to the provision in Section 4 of the standard form which requires payment of the reinsurance "upon proof of the payment" by the reinsured as the "critical words" and says:

> "* * * There are other provisions, as for example those relating to the apportionment of any collateral, which go to confirm the conclusion that the agreement did not subject the reinsurer to any liability except for a loss actually paid by the reinsured; but we need not consider them because we shall take it arguendo—and indeed we cannot see how it could be taken otherwise—that, as a new question, payment of the loss was a condition upon the reinsurer's obligation. Were it not for circumstances which seem to us conclusive, we should have felt ourselves obliged to read the promise in the defendant's sense.
>
> The controlling fact is the decision of the Supreme Court in *Allemannia Ins. Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326, 28 S. Ct. 544, 545, 52 L. Ed. 815, 14 Ann. Cas. 948, in which there was a clause on whose similarity to, and difference from, the fourth article of the agreement in suit the result at bar must turn." (R. 79.)

A copy of the agreement construed by this Court in the *Allemannia* case is set forth in the Appendix to this brief.

The *Allemannia* agreement reinsures the reinsured "under its policies" as follows:

> "By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, *hereby agrees to reinsure* the Firemen's Insurance Company of Baltimore, Maryland, *under its policies,* renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided * * *." (Appendix, p. 21, *infra.*) (Italics ours.)

The provisions of the *Allemannia* agreement which are deemed by the Circuit Court of Appeals in its opinion in this case to make the *Allemannia* case controlling are as follows:

> "10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, *or* paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, *and a copy of the original receipt taken upon the payment of such loss;* and upon request, shall exhibit and permit copies to be made

of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable prorata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, *and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company* under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof." (Appendix, pp. 24-25, *infra.*) (Italics ours.)

The opinion of the Circuit Court of Appeals in the present case indicates that its conclusion that the case is governed by the *Allemannia* case rests upon two alternative lines of reasoning, the first of which treats the *Allemannia* case as a controlling precedent and the second of which treats that case as a controlling fact bearing upon the intention of the parties.

In its first line of reasoning the Circuit Court of Appeals refers to the provision in Section 10 of the *Allemannia* agreement to the effect that after the reinsured shall have "adjusted, accepted proofs of, *or* paid" the loss it shall forward to the reinsured a proof of its loss and claim, together with a copy of the original proofs and claim "and a copy of the original receipt taken upon the payment of such loss",

and to the provision in Section 11 to the effect that "in no event shall this Company [the reinsurer] be liable for an amount in excess of a ratable proportion of the sum *actually paid* * * * by the said reinsured company * * *" (R. 79-80). The Circuit Court of Appeals observes that the use of the particle, "or", in Section 10 "seemed indeed to say that the reinsured might recover without paying the claim—that is, by only adjusting the loss or accepting proofs of it * * *", but says that the language of Section 11 to the effect that in no event should the reinsurer be liable for an amount in excess of a ratable proportion of the sum "actually paid" by the reinsured "certainly precluded taking the disjunctive as giving the reinsured any option", and points out that the general reasoning of the opinion in the *Allemannia* case concerned the nature, incidents and meaning of reinsurance in general and that that opinion "somewhat strangely, ignored" and "apparently did not consider" the language of Section 11 (R. 80). This apparently implies that because words in the *Allemannia* agreement which confined the liability of the reinsurer to a proportion of the sum "actually paid" by the reinsured were disregarded in reaching the decision in the *Allemannia* case, the words in the standard form involved here which condition the reinsurer's liability upon proof of payment by the reinsured should likewise be disregarded.

With respect to this line of reasoning of the Circuit Court of Appeals petitioner contends (1) that proof of payment by the reinsured is made a condition precedent by the plain meaning of the language of the standard form (*infra*, pp. 11-14), (2) that nothing in the *Allemannia* case requires that this plain meaning be disregarded

(*infra*, pp. 15-17) and (3) that no rule of law requires that this plain meaning be disregarded (*infra*, pp. 17-18).

The second line of reasoning of the Circuit Court of Appeals is based upon a chain of assumptions, partly expressed and partly implied, as follows: (1) That the draughtsmen of the standard form involved here, which was adopted by the Surety Association of America in 1930, and of an antecedent form adopted by the same association in 1915, had knowledge of the *Allemannia* case, (2) that draughtsmen with such knowledge would have used different language if they had intended the standard form to make proof of payment by the reinsured a condition precedent, (3) that when Southern and petitioner incorporated the standard form into the agreement sued upon the intention of the draughtsmen of the standard form was imputable to them, and, therefore, (4) that Southern and petitioner did not intend to make proof of payment by the reinsured a condition precedent (R. 81). No evidence of intention was introduced or offered (R. 16-24). The record does not contain any evidence or finding that the draughtsmen, who are not even identified, had knowledge of the *Allemannia* case or had any relation to Southern or petitioner (R. 18-24).

With respect to this line of reasoning of the Circuit Court of Appeals petitioner contends that the Court's conclusion as to the intention of the parties is erroneous because it is inconsistent with the plain meaning of the language used and the assumptions upon which it is based are not supported by any evidence (*infra*, pp. 19-20).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred

1. In holding that respondent can recover reinsurance under the agreement sued upon without paying the loss under the bond with respect to which the reinsurance was effected;

2. In holding that payment by the reinsured of the loss under the bond is not a condition precedent to respondent's right to recover reinsurance under the agreement sued upon;

3. In holding that the agreement sued upon is an agreement of indemnity against liability;

4. In applying the decision in *Allemannia Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, case as a controlling precedent;

5. In giving to the agreement sued upon a construction based upon certain assumptions of fact which are inconsistent with the plain meaning of the language of the agreement and are unsupported by any evidence.

ARGUMENT

I.

PROOF OF PAYMENT BY THE REINSURED OF THE LOSS UNDER THE BOND IS MADE A CONDITION PRECEDENT BY THE PLAIN MEANING OF THE LANGUAGE OF THE STANDARD FORM.

The provision of the standard form of reinsurance agreement involved in this case which requires payment of the reinsurer's share of the loss under the bond and of costs, expenses and interest "upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof" (R. 47, lines 72-74; quoted in full *supra,* p. 4) literally makes proof of payment by the reinsured a condition precedent. The word "upon" is commonly used to express the dependence of an obligation upon a condition. *Leeper Bros. Lumber Co.* v. *Gunter,* 61 Okla. 122; *Welch* v. *Matthews,* 98 Mass. 131; *Courtright* v. *Deeds,* 37 Iowa 503; *Casey* v. *Metropolitan Life Insurance Co.,* 123 Misc. 224; *Mascioni* v. *Miller, Inc.,* 261 N. Y. 1, 4; *Amies* v. *Wesnofske,* 255 N. Y. 156, 161, 162. The words "upon proof of the payment" etc. correspond with the common "proof of loss" clause, the effect of which is to make the proof of loss a condition precedent to the obligation to pay insurance. *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489; *Strang* v. *Prudential Ins. Co.,* 263 N. Y. 71; *Fink* v. *Catholic Order of Foresters,* 161 Minn. 70; *Connecticut General Life Ins. Co.* v. *Williams,* 87 S. W. (2d) 807 (Tex. Civ. App.); *Vecchio* v.

Metropolitan Life Ins. Co., 224 App. Div. 301; *Moriarty* v. *Tomlinson*, 58 S. D. 431. See 33 C. J. 7-8, 74-75.

The sentence immediately following the words "upon proof of the payment" etc. makes an exception, giving the reinsured the right to give the reinsurer written notice of its intention to pay the loss on a certain date and require payment of the reinsurance by such date (R. 47, lines 74-79).[1] The very existence of this exception, which is not applicable here because no such notice has been given, shows that the words "upon proof of the payment" express a condition precedent. Under the construction given to the standard form by the court below, this express exception would be surplusage because if that construction were correct the reinsured would be entitled to payment of the reinsurance irrespective of whether it intended to pay the loss.

There are other provisions of the standard form which show that the reinsured cannot recover without making payment. These provisions are as follows:

(1) The reinsurer agrees to "reinsure * * * against loss" (R. 47, lines 3, 9; quoted in full *supra*, p. 4). An agreement to reinsure is an agreement of indemnity. See *Ill. Mut. Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362,

[1]The full text of the exception is as follows:

> "The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond." (R. 47, lines 74-79.)

363, 365; *Royal Ins. Co.* v. *Vanderbilt Ins. Co.*, 102 Tenn. 264, 267, 270; *Allison* v. *Fidelity Mutual Fire Ins. Co.*, 81 Neb. 494, 497-498; 28 Harv. L. Rev. 302. Therefore, the words *"reinsure* * * * against loss" mean *"indemnify* * * * against loss" and show that the reinsured cannot recover without making payment, because an agreement to indemnify against loss, made with reference to a possible claim by a third party against the indemnitee, merely indemnifies against payment of the claim. *Van Schaick* v. *Burney*, 145 Misc. 887, aff'd 237 App. Div. 812; *National City Bank of New York* v. *Berwin*, 240 App. Div. 550; *Barsuk* v. *Independence Indemnity Co.*, 236 App. Div. 162; *State* v. *Mills*, 23 N. M. 549. See *MacArthur Brothers Co.* v. *Kerr*, 213 N. Y. 360, 364-366; *In re Lathrop, Haskins & Co.*, 216 Fed. 102, 106-107 (C. C. A., 2nd); *Macklin* v. *Northern Bank of Kentucky*, 83 Ky. 314, 320-321.

(2) It is agreed that the reinsurer shall have a one-half share of the proceeds of any collateral available to the reinsured in connection with the bond (R. 47, lines 124-125, 16-20; R. 48).[1] This shows that the reinsurer's obligation is merely to pay one-half of the amount paid by the reinsured, for the obvious purpose is to give the parties proportionate reimbursement for their respective contributions to this amount, and the equal division of the collateral would effect this purpose only if the contributions were equal. Under the construction given to the standard form by the court

[1]The provision for division of collateral is as follows:

"The Reinsurer shall be entitled to share with the Reinsured, in the proportion defined in section 2 hereof, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond." (R. 47, lines 124-125.)

below the provision for division of collateral would be inapt because the insolvent reinsured would have more than its fair share of the collateral.

(3) It is agreed that the reinsured shall bear a certain portion of the risk under the bond without reinsurance (R. 47, line 22 *et seq.*).[1] The obvious purpose of this is to give assurance to the reinsurer that the reinsured, whose determination as to its own liability on the bond is made conclusive as between it and the reinsurer (R. 47, lines 58-63), will always have a substantial interest which will impel it diligently to resist claims of questionable merit. The protection thus guaranteed to the reinsurer would be destroyed by the construction given to the standard form by the court below. Such a construction would permit the liquidator of an insolvent reinsured to recover reinsurance without paying the loss under the bond. Thus the liquidator would have no substantial interest impelling diligent resistance to claims of questionable merit in any case where the reinsurance collected would exceed the dividend which the liquidator would pay to the insured under the bond as a general creditor, because the concession of liability for such claims would involve no diminution of the assets of the insolvent estate but on the contrary would be profitable to the estate.[2]

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[1]The pertinent provision is Section 3 of the standard form, called the "retention requirement", which provides that, with certain variations, "the amount of liability retained by the Reinsured at its own risk" shall be "in no event less than the amount ceded" to the reinsurer (R. 47, line 22 *et seq.*).

[2]To permit the realization of a profit out of the reinsurance would be inconsistent with the fundamental principle of insurance. See *British Dominions General Ins. Company, Ltd.* v. *Duder*, [1915] 2 K. B. 394, 401, 403; *Castellain* v. *Preston*, 11 Q. B. D. 380, 386; *Ill. Mut. Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362, 363-364; 29 Harv. L. Rev. 102; 28 Harv. L. Rev. 302.

II.

NOTHING IN THE *ALLEMANNIA* CASE REQUIRES THAT THE PLAIN MEANING OF THE LANGUAGE MAKING PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT BE DISREGARDED.

In the *Allemannia* case it was pointed out that the only question in a case of this sort "is as to the construction of the language of the reinsurance compact" (209 U. S., pp. 331-332). The language to be construed in the present case is the language of provisions which reinsure "against loss" and provide for payment of reinsurance "upon proof of the payment" by the reinsured (*supra*, p. 4). The *Allemannia* agreement does not contain a provision which reinsures "against loss" or a provision which provides for payment of reinsurance "upon proof of the payment" by the reinsured (*supra*, pp. 6-7, *infra*, pp. 21-27). In no sense, therefore, can the *Allemannia* decision be deemed a precedent on the construction of these provisions. See *Estate of Whitney*, 171 Cal. 750, 760; *Sandberg* v. *Margold Realty Corp.*, 256 N. Y. 228, 231; *In re Oppenheimer's Estate*, 73 Mont. 560, 570, 571. In *Estate of Whitney, supra*, the court said (171 Cal., p. 760):

> "* * * As this court has had occasion to say repeatedly, decisions on the interpretation of written instruments have but limited value when applied to the construction of documents embodying different language."

The fact that the decision in the *Allemannia* case did not give effect to the plain meaning of the words which, liter-

ally, confined the liability of the reinsurer to a proportion of the sum "actually paid" by the reinsured does not require that here the plain meaning of the words which make proof of payment by the reinsured a condition precedent be disregarded. In the *Allemannia* case it was necessary to resolve a patent ambiguity. If the words "actually paid" had been taken literally they would have been inconsistent with the words requiring proof of loss by the reinsured "after said reinsured Company shall have adjusted, accepted proofs of, *or* paid such loss" (see pp. 7-8, 6-7, *supra*). In the present case there is no ambiguity and to disregard the plain meaning of the words "upon proof of the payment" and the words "reinsure * * * against loss" would create, not resolve, ambiguity. Under such circumstances the plain meaning of words cannot be disregarded. See *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 491-492; *Harrison* v. *Fortlage,* 161 U. S. 57, 63; *Henrietta Mills* v. *Commissioner of Internal Revenue,* 52 F. (2d) 931, 934 (C. C. A., 4th).

In the *Allemannia* case it was assumed that reinsurance would lose its chief value unless the reinsured could discontinue business without keeping sufficient funds on hand to pay losses before collecting reinsurance (209 U. S., pp. 334-337). We respectfully submit that this assumption overlooks the fact that companies make reinsurance agreements in such form as to accomplish their particular purposes. Agreements like the standard form are designed to diversify the risks of a going business (R. 41-43, 47), whereas, when insurers desire to discontinue business, they make agreements involving such features as novation or assumption of risk whereby they pass on to the reinsurer

the duty of adjusting and paying claims. *Cf. Glen* v. *The Hope Mutual Life Ins. Co. of N. Y.*, 56 N. Y. 379; *The People* v. *National Surety Co.*, 68 Colo. 231; *Baird & Son* v. *Kaskaskia L. S. Ins. Co.*, 198 Iowa 905; *Empire Life Ins. Co.* v. *Landman*, 213 Ala. 248. Such agreements are in a distinct category of their own. See *People* v. *American Central Ins. Co.*, 179 Mich. 371, 375-376; *American Bonding Co.* v. *American Surety Co.*, 127 Va. 209, 219-221.

III.

NO RULE OF LAW REQUIRES THAT THE PLAIN MEANING OF THE LANGUAGE MAKING PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT BE DISREGARDED.

Numerous decisions in this country, some before and some after the *Allemannia* case, have affirmed or assumed a "rule" to the effect that the reinsured can recover reinsurance without paying the loss.[1] But none of these cases in-

[1] *Hone* v. *The Mutual Safety Insurance Company*, 1 Sandf. 137, aff'd 2 N. Y. 235; *Norwood* v. *Resolute Fire Insurance Co.*, 47 How. Pr. (N. Y.) 43; *Ex Parte Norwood*, 3 Biss. 504, Fed. Cas. 10,364 (D. C., N. D. Ill.); *Cashau* v. *N. W. Nat. Ins. Co.*, 5 Biss. 476, Fed. Cas. No. 2,499 (C. C., E. D. Wis.); *Blackstone* v. *Alemannia Fire Ins. Co.*, 56 N. Y. 104; *Consolidated Real Estate & Fire Ins. Co.* v. *Cashow*, 41 Md. 59; *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396; *Providence-Wash. F. Ins. Co.* v. *Atlanta-B. F. Ins. Co.*, 166 Fed. 548 (C. C., N. D. Ga.); *French Mut. General Soc.* v. *United States F. & G. Co.*, 203 Fed. 558 (D. C., D. Md.), rev'd on other grounds, 212 Fed. 620 (C. C. A., 4th), certiorari denied, 234 U. S. 758; *Globe N. F. Ins. Co.* v. *American B. & C. Co.*, 198 Iowa 1072; *Hicks* v. *Poe*, 269 U. S. 118, aff'g 293 Fed. 766 (C. C. A., 4th), which affirmed without opinion 276 Fed. 949 and 293 Fed. 764 (D. C., D. Md.); *Republic Metalware Co.* v. *Gen. Reinsurance Corp.*, 245 App. Div. 232, modified 245 App. Div. 907.

volved any language similar to that involved here except *Globe N. F. Ins. Co.* v. *American B. & C. Co.*, 198 Iowa 1072. That case involved a prior standard form of reinsurance agreement substantially like the one involved here. There the Iowa Court said, by way of *dictum*, that the receiver of the reinsured could recover reinsurance for the benefit of general creditors without paying the loss on the bond. It rested this *dictum* upon an assumed "well settled rule" and did not devote one word of its opinion to consideration of the language of the standard form before it corresponding with the provisions reinsuring "against loss" and requiring payment of reinsurance "upon proof of the payment" by the reinsured which are involved here.

The same tendency to seek a "rule" in prior decisions instead of seeking the parties' intention in the language of the agreement is manifest in several of the other cases cited in the footnote on the preceding page. Obviously, however, the only rule to be derived from the cases is that payment by the reinsured is not a condition precedent unless made such by the reinsurance agreement. In cases involving construction of reinsurance agreements as in any other cases of construction, the meaning of the words used must control. There is certainly no rule of law that the plain meaning of words making payment by the reinsured a condition precedent must be disregarded.

IV.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE PARTIES TO THE AGREEMENT SUED UPON DID NOT INTEND TO MAKE PROOF OF PAYMENT BY THE REINSURED A CONDITION PRECEDENT IS ERRONEOUS BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE LANGUAGE OF THE AGREEMENT AND THE ASSUMPTIONS UPON WHICH IT IS BASED ARE NOT SUPPORTED BY ANY EVIDENCE.

The conclusion of the Circuit Court of Appeals that the parties did not intend to make proof of payment by the reinsured a condition precedent is erroneous because it is inconsistent with the plain meaning of the language of the agreement (see pp. 11-14, *supra*), and that plain meaning cannot be disregarded. See *Calderon* v. *Atlas Steamship Company,* 170 U. S. 272, 280; *Hawkeye Commercial Men's Ass'n* v. *Christy,* 294 Fed. 208, 213-214 (C. C. A., 8th); *National Pub. Co.* v. *International Paper Co.,* 269 Fed. 903, 904 (C. C. A., 2nd).

The court's conclusion as to the intention of the parties is erroneous for the additional reason that it is wholly hypothetical, resting upon a chain of assumptions which are not supported by any evidence. (See p. 9, *supra.*) The court could not properly find an intention of the parties on the basis of its series of unsupported inferences, first, that unidentified draughtsmen of the standard forms had knowledge of the *Allemannia* case, second, that these draughtsmen therefore had a certain intention, and, third, that these draughtsmen had such relation to Southern

and petitioner as to justify imputing their intention to these parties. Necessary facts cannot be found by thus piling inference upon inference. See *United States* v. *Ross*, 92 U. S. 281, 283-284; *Manning* v. *Insurance Co.*, 100 U. S. 693, 697-699; *United States F. & G. Co.* v. *Des Moines Nat. Bank*, 145 Fed. 273, 279 (C. C. A., 8th). Furthermore, with all deference to the Circuit Court of Appeals, we submit that it is not reasonable to assume that draughtsmen with the *Allemannia* case before them would have employed for the purpose of making payment by the reinsured a condition precedent any language other than the provisions of the standard form which reinsure "against loss" and require payment of reinsurance "upon proof of the payment" by the reinsured. This language is most appropriate for that purpose. (See pp. 11-14, *supra.*) It is far more cogent to conclude that if the draughtsmen had not intended a condition precedent they would never have used the language of a condition precedent.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Dated, October 5, 1937.

Respectfully submitted,

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Appendix

Reinsurance Compact.

The Allemannia Fire Insurance Company of Pittsburg, Pa., With the Firemen's Insurance Company of Baltimore, Maryland.

By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, hereby agrees to reinsure the Firemen's Insurance Company of Baltimore, Maryland, under its policies, renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided, by *The Allemannia Fire Insurance Company of Pittsburg, Pa., it Being Understood and Mutually Agreed* that each entry or certificate under this compact shall be made, issued and subject to and governed by the following terms, Conditions, and Stipulations:

Prohibitions, Lines and Limits.

1. Entries under this compact shall not be made to reinsure any portion of any contract covering risks prohibited in the list of *prohibited risks,* lines and limits furnished said Firemen's Insurance Company of Baltimore, Maryland, by this Company, and entries covering any risk or class of risks limited, shall not be binding for a sum in excess of the limits therein named, and entries shall not be binding for a sum exceeding the line or amount retained and carried by the said reinsured Company at its own risk, without other reinsurance, under its contracts covering property, in or on the same building or risk, in

or on which the contracts so reinsured may cover, and in or *on others next adjacent thereto or connected therewith.*

2. It being further understood, that when by cancellations of contracts, at request of the assured, or reinsured or by transfer to cover in another location, or by expiration of contracts, whereby the said reinsured Company may be left with a line of amount pending at its own risk of less than the amount reinsured, or without any contract so pending excepting that which may be reinsured *such entries shall not be invalidated thereby.*

AD-INTERIM ENTRIES.

3. *Ad-interim* or covering entries under this compact may be made to reinsure and cover such excess lines or risks, not prohibited and not to exceed the limits above referred to, as said reinsured Company may accept and insure or reinsure under its contracts.

4. Provided that on the day of such covering entry the said Firemen's Insurance Company as aforesaid of said reinsured Company shall mail to the said Allemannia Fire Insurance Company at Pittsburg, Pa., an advice or covering report of the number, amount and date of such entry, and state therein the name of reinsured, location, kind or class or risk covered, and the amount it may then have pending thereon.

5. The intention herein being, that this Company shall protect the said reinsured Company, in the manner herein provided, upon such excess lines, from the date they are covered under the contracts of said reinsured Company, until full reports of the same, may by it, be received, and such entries being fully reported to this Company as hereinafter provided, and in no event shall any *ad-interim* entry remain open or be binding *upon this Company for a longer period than fifteen days from the date thereof.*

Reinsurance Reports.

6. Each entry under this compact, and each cancellation, closing notice, endorsement or change that may refer to or change the ownership, location, or premium of the contract or risk hereunder reinsured, of which the said reinsured Company may have received notice at its office at Baltimore, Maryland, shall be promptly reported to this Company upon blanks provided for that purpose, and each of such reports shall contain a copy of the contract hereunder reinsured, and of the endorsements or changes herein referred to, and the amount, rate, premium, term and expiration of such contracts, or of the reports of same made to said reinsured Company by the parties issuing or making the same.

7. Full and regular reports as above, shall also be made to replace each advice or covering report and complete each *ad-interim* entry that may have been made under this Compact, within five days after said reinsured Company shall have received at its office at Baltimore, Maryland, a full report of the contract reinsured *ad-interim*, and in no event shall such full and regular reports be delayed beyond a period of fifteen days from the date of such *ad-interim* entry, otherwise, the same shall be deemed to have been terminated or rendered void; and all of the reports above referred to shall be lodged or filed with this Company and made a part of the entry to which they refer or pertain.

8. Each entry under this Compact shall be binding, commence, or take effect at 12 o'clock noon, of the day on which the reports herein referred to are mailed, addressed to the Allemannia Fire Insurance Company, at Pittsburg, Pa., and duly postmarked at the Post-office in the City of Baltimore, Maryland.

CANCELLATION OF ENTRIES.

9. This Company may decline any entry under this Compact, or cancel or terminate any entry by notifying the within named Firemen's Insurance Company, of said reinsured Company of its desire so to do, and refunding or tendering a pro-rata proportion of the reinsurance premium paid therefor, in which case the said reinsured Company shall be allowed ten days from the date of such notice within which to complete such cancellation, and the said reinsured Company may cancel and terminate any entry by allowing this Company the customary short rate proportion of the reinsurance premium thereon. It being understood that when any contract of said reinsured Company, hereunder reinsured, is cancelled at pro-rata rates, then this Company will refund at pro-rata proportion of the reinsurance premium received upon the entry reinsuring the same, also that a ratable proportion of any commission or other allowance made upon any reinsurance premium shll be deducted from the amount of unearned or returned premium, and the net balance only be returnable to said reinsured Company.

LOSSES AND LOSS EXPENSES.

10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original

proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof.

12. This Company shall reimburse the said reinsured Company for a ratable proportion of all actual expenses, legal and otherwise, incurred by said reinsured Company in adjusting, resisting or investigating any claim for loss under its contracts hereunder reinsured, or allowed by it therefor upon receiving a statement or account of said expenses.

ACCOUNTS AND ALLOWANCES.

13. The said Officers of the said reinsured Company shall render to the said Allemannia Fire Insurance Company at Pittsburg, Pa. not later than the fifteenth day of each calendar month, a statement of all entries, or certificates of reinsurance made or issued under this Contract during the immediately preceding month, and shall accompany the

same with an account current exhibiting the amount of reinsurance premiums as shown by said statement, and a remittance by check to order of said Allemannia Fire Insurance Company, to cover the amount of same, after deducting therefrom, the amount of cancelled or returned reinsurance premiums reported during the same month, and from the balance thus obtained 30% and 10% contingent per centum to cover commissions and all expenses excepting loss expenses.

TERMINATION OF CONTRACT.

14. This compact of reinsurance may be discontinued and terminated by either Company herein named, upon its giving thirty days' notice in writing to the other, and in the event of such discontinuance and termination of this Compact, all risks previously reinsured and accepted hereunder, shall remain in full force and effect until the expiration or cancellation of the original contracts, reinsured, unless otherwise mutually agreed.

AD-INTERIM RENEWALS.

15. It is hereby understood and agreed that whenever contracts of the Firemen's Insurance Company, reinsured by any single policy, or by entries under this compact, or any policy of this Company, is continued beyond expiration or termination by said reinsured Company, either by a renewal, agreement, or a new policy, or entry upon the same risk for the same amount as the expired or terminated contract so reinsured, such single policies or entries under said Compact or policies shall be considered as continuing and binding, *ad-interim,* for a period of not exceeding twenty days from the date of their expiration, in the same proportion and manner as they originally applied to such reinsured contracts. Provided that said reinsured Com-

pany shall mail to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., as provided in said Compact, a full report of the entry made to continue the reinsurance of such contracts as may be renewed or rewritten within five days after it shall receive notice of a renewal or continuation of such contracts, at its office at Pittsburg, Pa., and within twenty days after the expiration of said reinsurance policies or entries so continued, otherwise such *ad-interim* reassurances shall be void and of no effect.

IN WITNESS WHEREOF, this Company has caused these presents to be signed by its President and Secretary, in the City of Pittsburg, State of Pennsylvania, on this 8th day of June in the year eighteen hundred and ninety-five.

JOS. ABEL, *President.*

G. W. HAMMER, *Secretary.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937
No. 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Respondent.

PETITIONER'S REPLY BRIEF

RALPH S. HARRIS,
HAROLD L. SMITH,
E. MYRON BULL,
Counsel for Petitioners.

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IN THE

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OCTOBER TERM, 1937

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Petitioner,* *vs.* LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, *Respondent.*	No. 38

PETITIONER'S REPLY BRIEF

1. Respondent fails to show that his construction of the standard form of reinsurance agreement is supported by prior decisions.

The language of the standard form of reinsurance agreement involved in this case requires payment of reinsurance "upon proof of the payment" by the reinsured of the loss under the bond. Petitioner's main brief points out (pp. 11-12) that this language literally makes such proof of payment a condition precedent. Respondent makes no specific answer to this. He apparently assumes, as did the

Circuit Court of Appeals, that this language creates a condition precedent unless its literal meaning must be disregarded. Accordingly the main object of respondent's brief is to show that prior decisions require the Court to disregard the express condition precedent. No case cited by respondent requires this.

Allemannia Ins. Co. v. *Firemen's Ins. Co.*, 209 U. S. 326, is fully explained in petitioner's main brief (pp. 5-8, 15-16). Underlying respondent's emphasis upon the words "actually paid" in the *Allemannia* case (Brief, pp. 15, 16) is the conclusion that because these words were not given their literal meaning in that case the words "upon proof of the payment" should not be given their literal meaning in this case. This endeavor to invoke the *Allemannia* case as a precedent for disregarding language is patently fallacious.

Respondent's statement that the very agreement sued upon here was held in *United States* v. *Federal Surety Co.*, 72 F. (2d) 964, to be one of insurance against liability and not against loss (Brief, p. 12 n.) is incorrect. The decision in that case was merely to the effect that the plaintiff, asserting the rights of the party insured by the reinsured, could not sue the reinsurer.

Globe N. F. Ins. Co. v. *American B. & C. Co.*, 198 Iowa 1072, did not hold, as respondent states (Brief, pp. 19-20), that the recovery upon the standard form of reinsurance agreement there involved was for the benefit of general creditors. The recovery was for the benefit of the party insured by the reinsured, and the case was distinguished by the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Federal Surety Co., supra,* as involving an agreement by the reinsurers, distinct from

that contained in the standard form, to be directly liable to that party (72 F. (2d), p. 968).

None of the cases cited by respondent except *Globe N. F. Ins. Co.* v. *American B. & C. Co.* and *United States* v. *Federal Surety Co.* involved any language similar to that involved here.

The primary purpose of respondent's citations is to establish the existence of a rule governing the present case. The cases and texts cited, however, indicate nothing more than that payment by the reinsured is not a condition precedent to recovery of reinsurance unless the reinsurance agreement makes payment a condition precedent. Here the reinsurance agreement expressly makes payment a condition precedent. There is no rule which requires the Court to disregard the express condition precedent.

2. Respondent fails to show that his construction of the standard form of reinsurance agreement is supported by the language thereof.

In answer to respondent's conclusion that the words "reinsurance" and "reinsure" are "instinct with a promise * * * to indemnify * * * against liability" rather than against loss (Brief, p. 5), it is sufficient to point out that the standard form of reinsurance agreement reinsures expressly "against loss" (R. 47, lines. 3, 9) and respondent fails specifically to answer petitioner's argument (Main Brief, pp. 12-13) that an agreement to reinsure against loss indemnifies against payment.

Respondent stresses the provision (R. 47, lines 120-121) that "No action shall be brought against the Reinsurer hereunder unless brought within twelve months after

the date of the final settlement of all obligations under the bond" (Brief, pp. 23-25). This provision is equally appropriate under either construction of the agreement. Although respondent's position is that the words "final settlement" must be construed to mean "a determination of the amount due, or fixation of liability" (Brief, p. 25), the fact that they may also mean payment or some other form of discharge is shown by the authorities which he cites[1], and is apparently conceded by his statement (Brief, p. 24) that "The District Court * * * indicated that the word 'settlement' could be used in other ways * * *." Thus, the "no action" clause gives no aid to respondent's construction.

There is not, as respondent apparently assumes (Brief, p. 24), a rule that an indemnity agreement must be construed as indemnity against liability unless the "no action" clause requires payment before suit. The two cases cited by respondent on page 24 are merely examples of hundreds of cases each involving the question whether a particular insurance agreement, such as an automobile liability policy or an employers' liability policy, merely indemnifies the insured against payment.[2] The decisions in these cases go one way or the other according to the specific language of the whole agreement, and it would serve no useful purpose to consider them.

---

[1]Bouvier's Law Dictionary, Baldwin's Ed. 1934:
"Settle. To adjust or ascertain; to pay."
Webster's New International Dictionary:
"Settle.
* * *
5. To adjust, as accounts; to liquidate; to balance.
6. Hence, to pay; as, to *settle* a bill. *Colloq.*"

[2]A great many of these cases are cited and classified in notes in 37 A. L. R. 637, 83 A. L. R. 677, 37 A. L. R. 644, and 48 L. R. A. (N. S.) 184.

Respondent emphasizes the present tense of the word "exists" in the provision that "no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability * * * for loss * * * exists or existed under some other bond * * *" (Brief, p. 26). The use of the verb "exists" in both present and past tenses is perfectly consistent with petitioner's construction, for when the reinsured avails itself of its express right to give notice requiring payment of the reinsurance by a certain date (R. 47, lines 74-76), the liability of the reinsurer then relates to an "existing" liability of the reinsured.

Petitioner points out (Main Brief, pp. 13-14) that the provision for equal division of any available collateral shows that the reinsurer's obligation is merely to pay one-half of the amount paid by the reinsured, for the obvious purpose is to give the parties proportionate reimbursement for their respective contributions to this amount and the equal division of the collateral would effect this purpose only if the contributions were equal. Respondent argues (Brief, pp. 27-29) that if the reinsurer's obligation is merely to pay one-half of the amount paid by the reinsured, equal division of what he calls "salvage" would unduly favor the reinsurer in the event of insolvency of the reinsured. The premise of this argument is the assumption that the "salvage" may exceed the amount paid by the insolvent reinsured. This assumption is obviously incorrect so far as the proceeds of collateral are concerned because the amount for which collateral could be enforced would necessarily be limited to the amount paid. Respondent does not show this assumption to be correct even so far as the proceeds of indemnity agreements are concerned.

There is nothing in the record to support his statement (Brief, p. 27) that indemnity agreements commonly exacted by surety companies are agreements to indemnify against liability and not against loss. The nature of the indemnity afforded by such indemnity agreements depends upon their particular language and it is pertinent here to point out that respondent has not challenged the statement in petitioner's main brief (p. 13), supported by many authorities, that an agreement to indemnify against loss, made with reference to a possible claim by a third party against the indemnitee, merely indemnifies against payment. Thus respondent's argument is based upon an unsound premise.

It is significant that nowhere in his brief does respondent deny petitioner's statement (Main Brief, pp. 13-14) that under the construction given to the standard form by the court below the provision for division of collateral would be inapt because the insolvent reinsured would have more than its fair share of the collateral.

Attempting to show that the exception to the requirement of proof of payment (which enables the reinsured to require payment by a certain date by giving notice of its intention to pay the loss on that date) would not be surplusage if his construction of the agreement were correct, respondent states (Brief, p. 17) that the purpose of this provision is to eliminate book entries. This explanation is purely speculative and unconvincing, but even if it were correct, the exception would nevertheless be surplusage under respondent's construction of the agreement because if payment by the reinsured were not a condition precedent the reinsured could always collect the reinsurance before making payment and there would be no need for the exception.

3. Respondent fails to show that the parties to the agreement sued upon did not intend to make proof of payment by the reinsured a condition precedent to recovery of reinsurance.

In reply to respondent's suggestion (Brief, pp. 21-22) that, in view of the *Allemannia* case and the *Globe* case, different language should have been employed in the standard form to express any intention that payment by the reinsured be a condition precedent, it is sufficient to point out that language most appropriate for this purpose is contained in the provision that

> "* * * the Reinsurer does hereby reinsure * * * against loss" (R. 47, lines 3-9)

and the provision that

> "The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured *upon proof of the payment of such items* by the Reinsured, * * *" (R. 47, lines 72-73).

Respondent fails in his effort to suggest more appropriate language. He suggests a provision to the effect that the reinsurer should be liable only for its *pro rata* portion of the amount actually paid (Brief, p. 22). This is the very language which was held in the *Allemannia* case to be insufficient to make payment a condition precedent.

Respectfully submitted,

RALPH S. HARRIS,
HAROLD L. SMITH,
E. MYRON BULL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. [redacted]38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the SOUTHERN SURETY COMPANY OF NEW YORK,
Respondent.

BRIEF OF SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE SOUTHERN SURETY COMPANY OF NEW YORK, OPPOSING PETITION FOR WRIT OF CERTIORARI.

ALFRED C. BENNETT,
IRVIN WALDMAN,
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Respondent.

BRIEF OF SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE SOUTHERN SURETY COMPANY OF NEW YORK, OPPOSING PETITION FOR WRIT OF CERTIORARI.

Statement.

This brief is written in opposition to the petition of the Fidelity & Deposit Company of Maryland, the defendant-appellant in the Court below, for a writ of certiorari.

The action, originating as a test case, had for its purpose an adjudication of the effect of the reinsurance agreement involved herein. Such an adjudication will affect many insurance companies and is of great importance to the New York Insurance Department, in that many of the claims existing between the various companies in liquidation rest upon such a reinsurance agreement.

Opinions Below.

The District Court, in directing judgment in favor of the respondent after trial, wrote an opinion (R. 54), which is reported in 15 Fed. Supp. 715. It referred therein to the long line of decisions holding reinsurance to be an agreement to indemnify the reinsured "not against payment actually made but against liability actually incurred", pointed out the similarity between the reinsurance agreement in the case at bar and the reinsurance agreement in the case of *Allemannia Fire Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, and observed that the entire phraseology of the agreement indicated no intention to depart from the settled law as enunciated in the *Allemannia* case, and that the language used in the various clauses fortified that conclusion.

The Circuit Court of Appeals, in affirming the judgment of the Court below, wrote an opinion (R. 78), reported in 88 Fed. (2d) 630, wherein it advanced additional reasons for approving the judgment of the District Court. After referring to the *Allemannia* case and the similarity between the reinsurance agreement in that case and in the case at bar, it drew attention to the new "Standard Form of Reinsurance Agreement", prepared in 1915, seven years after the *Allemannia* decision, which "standard form * * * was almost literally the same as the form of 1930", which is the form of agreement employed in the case at bar (R. 47). It concluded that if there had been an intention by the Surety Association to make the standard forms of reinsurance agreement drafted in 1915 and 1930, agreements to indemnify against loss rather than against liability, language unequivocally manifesting that intention would have been used. The Court parenthetically alluded to the case of *Globe National Fire Insurance Co.* v. *American Bonding & Casualty Co.*, 198 Iowa 1072 (R. 81), wherein the 1915 form was construed adversely to the defendant

and said that it did not rely upon that decision as having been known to the Surety Association when their draftsmen drew the 1930 Standard Form, "though it is probable that that decision also was known". It disposed of the contention that the result unjustly enriches the plaintiff by remarking that while the recovery swells the funds available to pay its creditors in general, the *shareholders* do not profit thereby.

Argument.

The petitioner is liable to the respondent under the reinsurance agreement to the extent of one-half of the liability of the insolvent company in liquidation. Neither proof of payment nor notice of intention to pay by the reinsured is a prerequisite to recovery by the reinsured's Liquidator.

The petitioner contends that proof of payment by the reinsured of the loss under the bond is a condition precedent to a recovery by the Liquidator of the reinsured and endeavors to draw a distinction between the compact of reinsurance in the *Allemannia Fire Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326, case and the agreement involved in the instant case.

It would serve no useful purpose to discuss each of the many cases cited in the petitioner's brief, most of which are not apposite and *none of which changes the rule of law enunciated in the Allemannia case that reinsurance is an agreement to indemnify against liability and not against loss.*

Mr. Justice PECKHAM, who wrote the unanimous opinion for the Supreme Court in that case, said (p. 332):

> "The term 'reinsurance' has a well-known meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed 'double insurance', i.e., an insurance of the same interest. The contract is one of indemnity to the person or corporation reinsured, and it binds the reinsurer to pay to

> the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured * * *. The claim of the reinsured rests upon its liability to pay its loss to the original insured, and is not based upon * * * ability to pay * * *."

The rule so expressed has been echoed and re-echoed time and again, before and since the writing of that decision.

Hicks v. *Poe*, 269 U. S. 118; *Hone* v. *Mutual Safety Ins. Co.*, 2 N. Y. 235; *Blackstone* v. *Allemannia Fire Ins. Co.*, 56 N. Y. 104; *Herckenrath* v. *American Mutual Insurance Co.*, 3 Barb. Ch. 63; 33 *C. J.*, p. 57; *Vance on Insurance*, 2d Ed., 1930, pp. 942, 946; *Couch's Cyc. of Insurance Law*, Sec. 2277, Vol. 8; *Cooley's Briefs on Insurance* (2d Ed.), p. 6750, Vol. 7; 50 *Harvard Law Review*, pp. 95-96; *United States in Use, etc.* v. *Federal Surety Co. et al.*, 72 Fed. (2d) 964, 967; *Cashau* v. *Northwestern Nat. Ins. Co.*, 5 Biss. 476, Fed. Cas. No. 2499; *Yonkers & New York Fire Ins. Co.* v. *Hoffman Fire Ins. Co.*, 29 N. Y. Super. Ct. 316.

The similarity of the compact of reinsurance in the *Allemannia* case and the contract of reinsurance in the instant case is portrayed in the subjoined parallel columns:

Contract of Reinsurance in the Allemannia Case.	**Contract of Reinsurance in the Instant Case.**
"10. Upon receiving notice of any loss or claim under any contract hereunder reinsured, the said reinsured company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, of the same, and of the date and probable amount of loss or dam-	"4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer prompt written notice thereof at the Reinsurer's home office. The term 'home office', wherever used herein, shall be deemed to mean the home office

age, and after said reinsured company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, a proof of its loss and claim against this company, upon blanks furnished for that purpose by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and, upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

"11. Each entry under this compact, unless otherwise provided in this contract, shall be subject to the same conditions, stipulations, risks and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions, as paid by the said reinsured company under its contracts hereunder reinsured; and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof."

in the United States. The Reinsured shall take charge of all matters arising under the bond in connection with claims. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims and defend, settle, or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under some other bond or bonds given at any time by the Reinsured.

"The Reinsured's authority to handle and settle claims in accordance with its own judgment as outlined above shall not be annulled, abridged, or otherwise affected, if the Reinsured consults the Reinsurer, by letter, in conference, or otherwise, with reference to such handling and settling of claims; provided that the reservation of rights on the part of the Reinsured effected

by this paragraph shall apply only to matters and questions, the sole determination of which is left by this agreement in the hands of the Reinsured.

"If any loss hereunder shall be settled, wholly or in part, through the issuance by the Reinsured of a surety bond, the Reinsurer shall participate in such bond in the proportion defined in section 2 hereof.

"The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date; provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond."

In the *Allemannia* case, Clause 10 required prompt notification, in the event of a loss by the assured of a reinsured, and the forwarding to the reinsurer of various papers "and a copy of the original receipt taken upon the payment of such loss". Clause 11 provided that the reinsurance agreement was to be subject to the same conditions, stipulations and risks as were assumed by the reinsured under its original policy "and loss if any shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the reinsured * * * and in no event shall this company be liable for an amount in excess of a ratable proportion of *the sum actually paid* to the assured * * * by the said reinsured company under its original contract hereunder insured".

In the "Standard Form" used here, the reinsured is required to give prompt written notice of any claim. The requirement as to the forwarding of papers or documents is omitted and, in place thereof, the reinsured is given *carte blanche* with respect to the settlement of any claim except "that no payment or other method of settlement by the reinsured shall preclude the reinsurer from showing that the *alleged liability or any part thereof for loss* under the bond exists or existed under some other bond or bonds given at any time by a reinsurer" (ll. 64-65).

As in the *Allemannia* case, where the liability of the reinsurer was limited to a ratable proportion *"of the sum actually paid"*, so in the case at bar the reinsurer's proportionate share of the loss is required to be paid upon "proof of payment".

The provision in the *Allemannia* case requiring a receipt for the payment of the loss to be produced when demand was made for the proportionate share by the reinsured evoked this explanation by Mr. Justice PECKHAM (p. 337):

> "That if the loss or claim has been in fact paid, then a copy of the receipt is to be sent, but *it does not mean that there must be payment before any liability on the part of the reinsuring * * * company exists.*" (Italics ours.)

The precursor of the "Standard Form of Reinsurance Agreement adopted by the Surety Association of America, 1-15-30" (R. 47), involved in the instant case, was the "Standard Form of Reinsurance Agreement adopted by the Surety Association of America, May 12, 1915" (R. 49), but seven years after the handing down of the decision of the Supreme Court of the United States in the *Allemannia* case, *supra*. The language of that agreement with respect to the giving of notice of intention to pay is almost precisely the same as is used in the agreement sued upon. The use of parallel columns is employed in order to show the similarity:

Language Used in the Standard Form of Reinsurance involved in the Instant Case.	**Language Used in the Standard Form of Reinsurance Agreement Adopted in 1915.**
"• • • The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date; provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond" (R. 47, ll. 74-79).	"• • • The Reinsurer may, however, give the Reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to pay its proportionate share of such loss before such date; but in that case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond" (R. 49, ll. 36-39).

And, just as in the instant case, the agreement sued upon "does hereby reinsure • • • against loss", so also the Standard Form of Agreement adopted in 1915 "does hereby reinsure • • • against loss". The correspond-

ing provisions of these two agreements are again subjoined in parallel columns:

Language Used in the Standard Form of Reinsurance Involved in the Instant Case.	Language Used in the Standard Form of Reinsurance Agreement Adopted in 1915.
"In consideration of the premium payable under section 1 hereof , hereinafter called the Reinsurer, does hereby reinsure Fidelity and Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered , together with all riders attached thereto, hereinafter called the Bond, issued by the Reinsured in the penalty of Dollars, in favor of (obligee), and in behalf of , hereinafter called the Principal, against loss thereunder and against costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement."	"In consideration of the premium stated in section 1 hereof , hereinafter called the Reinsurer, does hereby reinsure the Fidelity and Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered. , hereinafter called the bond, issued by the Reinsured in the penalty of Dollars, in favor of (obligee) and in behalf of (principal), against loss thereunder and against costs and expenses, as hereinafter defined. A copy of the bond is or is to be attached hereto, and is hereby made a part of this agreement."

There are other similarities too numerous to mention. The agreement sued upon is merely an amplification of the 1915 Standard Form. Fundamentally and basically, they are the same.

The 1915 Standard Form was considered in 1923, seven years before the Standard Form involved in the present case was adopted. *This twin brother of the agreement involved in the case at bar was held to be an agreement to reinsure against liability and not against loss, the Court holding that recovery could be had by the receiver of an insolvent reinsured without prior payment of the loss,*

under that agreement, and that such recovery from the reinsurer was for the benefit of general creditors:

> "The right of the receiver to recover is challenged upon the ground that the insolvent surety has discharged no part of its liability upon the bond executed for the benefit of appellee, and that, as it has suffered no loss, no recovery can be had in the name of the receiver. The contrary appears to be the well-settled rule. The reinsurance contracts are contracts of indemnity, and the receiver is entitled *to recover under the issues and facts of this case, either, for the benefit of general creditors without the prior payment of the loss insured upon the bond.*" (Italics ours.)
>
> *Globe Nat. Fire Ins. Co.* v. *American Bonding & Casualty Co.*, 195 N. W. 728, 729.

The similarity of the reinsurance agreement in the *Allemannia* case with the Standard Form of 1930 involved in the present case (R. 47) and both with the Standard Form adopted May 12, 1915 (R. 49), is most striking and leads to the conclusion that there was no intention on the part of the Surety Association of America, the sponsors of the Standard Form of Reinsurance Agreement adopted in 1915 as well as that adopted in 1930, to depart from or change the rule of law with respect to agreements of reinsurance, which through the centuries had been treated as contracts of indemnity against liability and had been reaffirmed as such by this Court in 1908 in *Allemannia* v. *Firemen's Insurance Co., supra,* and other cases.

The marked resemblance of the 1915 and 1930 Standard Forms of Reinsurance has been commented upon, as has also the fact that the 1915 Standard Form (R. 49) was drawn but seven years after the *Allemannia* decision. Eight years later, in 1923, the Supreme Court of Iowa analyzed that agreement in a controversy wherein the defendant contended that such agreement was one of indemnity against loss and not against liability, and held directly that it was one of insurance against liability wherein the

insolvent reinsured was not required to make payment to the primary assured before seeking recovery from the reinsurer of the latter's proportionate share of the risk.

Globe National Fire Insurance Company v. *American Bonding and Casualty Company, supra.*

Seven years later, in 1930, the Standard Form of Reinsurance Agreement upon which the instant action is predicated was adopted, which, in form as well as in substance, is, with the exception of a few added refinements, precisely the same as was the Standard Form of 1915.

It is submitted, that if it had been the intention of the sponsors of the Standard Form of 1915 (R. 49), drawn seven years after the Supreme Court decision in the *Allemannia* case, or its successor, the Standard Form of 1930 involved herein (R. 47), drawn seven years after the decision of the Supreme Court of Iowa in the *Globe* case, *supra,* or the intention of the parties to the 1930 Standard Form in the case at bar, to depart from or modify the ruling in the *Allemannia* case, holding that a reinsurance compact was an agreement for indemnity against liability and not against loss, and to depart from or modify the ruling in the *Globe* case that the 1915 Standard Form of Reinsurance Agreement was a contract for indemnity against liability and not against loss, it is reasonable to assume that they would have manifested such intent in unmistakable terms, would not have used the same language as was used in the 1915 Standard Form, and would have squarely said that the parties intended that the reinsurer should not be liable and should not be called upon to pay its pro rata share of the loss suffered by the reinsurer, unless and until the reinsured had made payment of the loss to its assured, that the reinsured should only be liable in such an event for its pro rata portion of the amount actually paid and that *no action could be brought by the reinsurer unless instituted within a certain time after actual payment.*

Clause 9 of the reinsurance agreement sued upon (R. 47, ll. 120-121) is particularly significant in showing that the parties did not intend actual payment by the reinsured to be a condition precedent to the right of recovery against the reinsurer. It provides that "No action shall be brought against the reinsurer hereunder unless brought within twelve months after the date of the *final settlement* of all obligations under the bond". *It does not require final payment* of all obligations or liquidation of all obligations or discharge of all obligations; *it refers merely to a settlement.* The identical clause is found in the 1915 Standard Form (R. 49, ll. 75-76). If "final settlement" in the 1915 Standard Form was not construed to mean payment by the Iowa Court, it is submitted that no basis exists now for changing its meaning or asserting that its transposition, without change of accompanying words, into the 1930 Standard Form has altered its meaning.

As used in the 1915 Standard Form construed by the Iowa Supreme Court, in other reinsurance agreements and in the reinsurance agreement in the case at bar, the connotation carried by the word "settlement" is not that of payment, but of adjustment or fixing of the amount of liability.

The term "final settlement" has been judicially defined as meaning not payment, but a determination of the amount due:

> "It argues that final 'settlement' here means payment. So to hold would run counter to the whole scheme of the agreement between the companies. What the Munich assumed was one-third of the liability * * *. The words 'final settlement' as used in this contract must be held to mean the fixing by agreement or judicial determination of the amount to be united on the bonds or policies for which the Munich assumed one-third liability."
>
> *Poe* v. *Munich Reinsurance Co.*, 276 Fed. 949.

The petitioner further contends that if the Liquidator is permitted to recover the proportionate share of reinsur-

ance without first paying the loss, it would invite little or no resistance to unfounded claims and open the door to fraud, because thus the insolvent estate could realize a profit by conceding liability for unfounded claims whenever the reinsurance would exceed the amount which the Liquidator could pay to the company insured under the bond as a general creditor. Further, that realization of a profit out of reinsurance "would be inconsistent with the fundamental principle of insurance", citing *Castellain* v. *Preston,* 11 Q. B. D. 380.

The case cited is not relevant. It involved no reinsurance and stands for the proposition that a marine or fire insurance policy is a contract of indemnity only under which a loss shall be fully indemnified and never more than fully indemnified. The case at bar is not concerned with a marine or fire policy or any other kind of an insurance policy. It is concerned with a reinsurance agreement, which is not a policy of insurance.

> *Aetna Casualty and Surety Co., et al.* v. *International Reinsurance Co., et al.,* 117 N. J. Eq. 190.
> *Cunningham, et al.* v. *Republic Insurance Co., et al.,* 94 S. W. (2d) 140.

On the question of fraud, it is well to observe that there is no such issue presented. The propriety and validity of the allowance of the claim by the Liquidator has been conceded (R. 24). Moreover, the insolvent reinsured is doing nothing. It is dissolved and a State officer is liquidating its assets for the benefit of creditors.

In passing, it may be noted that the agreement as construed does not shut the door to the defense of fraud by a reinsurer. The language of the reinsurance agreement (R. 47) which makes the "decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond * * * final and conclusive and unconditionally binding upon the reinsurer" (ll. 62-63) does not, and can-

not by the wildest stretch of the imagination, be interpreted so as to preclude the reinsurer from resisting payment to the reinsured (or, in the case of insolvency, to the receiver), on the ground of fraud.

Assuming, but not conceding, that the purpose of the agreement is to give the reinsured a motive to exercise diligence in protecting the reinsurer from unfounded claims, as is contended by the appellant, this motive is not slain by insolvency, but is merged in the higher and broader motive *and duty* of a receiver or liquidator, to resist all unfounded claims, not merely for the benefit of the reinsurer or the reinsured, but for the benefit of all creditors of the reinsured and others interested in the estate thereof. If he does not perform his duties in the manner expected of him, and is guilty of fraud or negligence as a result of which the reinsurer is called upon to pay, as its proportionate share of the risk, an amount which might have been considerably lessened had the receiver or liquidator performed his duty and not been guilty of negligence or fraud, is it not obvious that payment could be resisted and the receiver or liquidator called to account by the reinsurer and the creditors of the insolvent company? The insolvent company in such an event is no more. Any motive which it might have had in allowing unfounded claims no longer exists. The receiver or liquidator would not benefit by any such negligence or fraud, and would leave himself open to personal liability for any such acts; any moneys recovered by him would inure not to his benefit, but to the benefit of the general creditors of the defunct company.

Nor does any question of profit enter. The *Southern* cannot make a profit; it is dissolved and out of business and its affairs and estate are being administered by the Superintendent of Insurance of the State of New York, as Liquidator thereof, for the benefit of creditors (R. 25).

In the case of an insolvent reinsured, the recovery of the full share from the reinsurer is not barred by the fact that the reinsured has not paid or will not pay its credi-

tors or its primary assured mentioned in the reinsurance agreement in full (see citations and authorities, *supra*).

Certainly there is no reason, let alone a good reason, why the reinsurer should be permitted to take advantage of the misfortune of the reinsured. The latter in no way failed to perform any of the terms, covenants and conditions of the contract between the insolvent company and the reinsurer on the part of the insolvent company to be performed (R. 23). Even its failure to perform its contract with its primary assured by reason of the intervention of the State of New York would not have excused its own assured from the performance of the contract insofar as he was concerned.

Pink v. *Isle Theatrical Corp.*, 271 N. Y. 390.

Just why the reinsurer, with respect to whom all the terms and conditions of the contract have been performed, should be privileged to take advantage of the misfortune of the reinsured, *which has in no way affected it,* is difficult to comprehend. The reinsurer entered into a reinsurance agreement under which it received a premium from the reinsured as a consideration for assuming the proportionate share of a risk up to and not exceeding a certain amount. A loss under the bond issued by the reinsured having occurred, the reinsurer is only being called upon to do that which it agreed to do for a consideration, viz.: pay its proportionate share of the risk. Why should the reinsured's misfortune, which has in no way injured the reinsurer and has not tended to diminish or wipe out the consideration which the latter received, excuse such reinsurer from the performance of the agreement? It is bound to pay such a proportion of the loss as its reinsurance bears to the sum originally insured.

Jackson v. *St. Paul Fire and Marine Ins. Co.*, 99 N. Y. 124, 129-130.

The money recovered is not for the benefit of the reinsured, but for the benefit of general creditors among which

is numbered the primary assured of the defunct company in the instant case. He shares this recovery ratably with other general creditors and enjoys the fruits of recoveries made from other reinsurers in the same manner as other primary assureds will enjoy the fruits of recoveries made by the respondent from the petitioner.

Royal Ins. Co. v. *Vanderbilt*, 52 S. W. 168.
Globe Nat. Fire Ins. Co. v. *American Bonding & Casualty Co., supra.*
U. S. in Use, etc. v. *Federal Surety Co.*, 72 F. (2d) 964, 967.

CONCLUSION

The petition for a writ of certiorari should be denied.

New York, May 12, 1937.

Respectfully submitted,

ALFRED C. BENNETT,
IRVIN WALDMAN,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Petitioner, vs. LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the SOUTHERN SURETY COMPANY OF NEW YORK, Respondent.	No. 38.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Statement of Case.

The facts which gave rise to this action are not in dispute, and were stipulated in writing in the District Court (R. [illegible] They were made the Court's special findings of fa[illegible]. 16).

In the statement set forth at the beginning of petitioner's brief, there appear to be omissions of certain facts which the respondent deems material and pertinent to the points which he makes in this brief, and he therefore sets them forth below in somewhat greater detail.

The respondent is the Superintendent of Insurance of the State of New York and is the Liquidator of the Southern Surety Company of New York, which up to March 22, 1932, was authorized, as a corporation organized in the State of New York, to do a surety and insurance business. On the last mentioned date, by an order of the Supreme Court of the State of New York, made, entered and filed in the office of the County Clerk of New York, the company was declared insolvent, its charter annulled and title to its assets vested in the Superintendent of Insurance of the State of New York, as liquidator thereof, with instructions to liquidate the company (R. 25).

The Southern Surety Company of New York, in the regular course of business and before the entry of the order of liquidation, had issued its fidelity bond to one John DeMartini Co., Inc., wherein it bound itself to indemnify the said John DeMartini Co., Inc., for any pecuniary loss which the latter might sustain through the fraudulent or dishonest acts of its employees during the terms of said bond. While such bond was in effect, an employee, one Marvin Goldblatt, committed fraudulent and dishonest acts within the meaning of the bond, whereby the assured sustained a loss amounting to $7,045.41, for which it filed a proof of loss with the Southern Surety Company of New York. At the time of the entry of the order of liquidation, the claim of John DeMartini Co., Inc., was in the process of examination and investigation by the company, and after the entry of the order of liquidation, the claim was allowed in the liquidation proceeding (R. 18).

On the day Southern Surety Company of New York issued its fidelity bond to John DeMartini Co., Inc., the petitioner reinsured the Southern to the extent of one-half of its liability on said bond not to exceed the sum of $5,000 subject to the terms of a general reinsurance agreement entered into between the petitioner and the Southern on or about the 1st day of April, 1930 (R. 48 and R. 41).

The suit to recover the petitioner's share of the risk was resolved in favor of the respondent by the District Court who brushed aside the contention of the petitioner that, under the terms of the reinsurance agreement, actual payment of the loss to the DeMartini Company was a prerequisite to a recovery and that the reinsurer's liability was limited to the extent of one-half of the amount actually paid. The learned District Judge observed, citing cases, that the question presented had "been determined adversely to the contention of the defendant (petitioner) in a long line of decisions, which have consistently held that under an ordinary agreement of reinsurance, the obligation of a reinsurer is to indemnify the assured not against payment actually made but against liability actually incurred"; and that the attempts of the petitioner to distinguish the cases cited from the instant case on the ground the agreements are dissimilar, were abortive, and said that "a careful comparison of the present agreement with the agreement in *Allemannia* v. *Firemen's* (*supra*) discloses no essential difference insofar as the question under consideration is concerned", and after referring to the similar clauses, concluded that "no departure from the settled law of the *Allemannia* case was intended" (R. 57).

The Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment on the authority of the *Allemannia* case, among others, and in answer to one of petitioner's contentions said that petitioner, in entering into the reinsurance agreement, undertook "to accept the hazard of the loss, and why it should be able to interpose as a condition the continued ability of the reinsured to meet its part of the obligations is not clear. Of course if it so stipulated, it may insist; but it must stand upon its contract, no general considerations of equity make in its favor" (R. 81).

Summary of Respondent's Argument.

Reinsurance is and always has been held to be an agreement by the reinsurer to indemnify the reinsured against the whole or a proportionate share of the latter's liability to its primary assured. The payment of the reinsurer's obligation to the reinsured is not dependent upon the ability of the latter to pay its assured. The reinsurer having entered into an agreement for which it received a consideration should not be permitted to avail itself of the misfortune of the reinsured as a shield with which to avoid payment of its obligation. The ill fortune of the reinsured in no way diminished or affected the consideration received by the reinsurer.

The reinsurance agreement involved herein shows no intention on the part of the parties to subvert the well settled and universally understood obligations of a reinsurer. Moreover, the circumstances surrounding the drawing of such agreement and its similarity to the reinsurance agreement in the case of *Allemannia Fire Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, and other reinsurance pacts, conclusively manifest an intention to abide by and be bound by the rule of law therein enunciated and reiterated.

POINT I

The petitioner is liable upon the reinsurance agreement to the extent of one-half of the liability of the insolvent company in liquidation. Proof of payment is no prerequisite to a recovery by the reinsured's Liquidator.

The petitioner's argument, summarized, is that the reinsurance agreement sued upon is one of indemnity against loss, and, since the respondent has made no *actual* payment to the primary assured on his loss under the bond issued by the now insolvent reinsured, the respond-

ent cannot recover from the reinsurer the latter's proportionate share of its liability therefor. It contends that the language of the agreement sued upon makes payment by the reinsured a condition precedent to recovery by the Liquidator. No case cited by petitioner in its brief sustains this contention.

The respondent submits that the agreement is one of insurance against liability and that the petitioner became liable for its proportionate share of the risk as soon as the insolvent reinsured's liability to its assured became fixed; that neither actual payment of the loss nor notice of intention to pay is a condition precedent to recovery from the petitioner.

In approaching the primary question, i.e., the nature of reinsurance (the subject and object of the agreement), the inquirer is confronted with a line of cases and authorities holding squarely that reinsurance imposes a liability upon the reinsurer whether or not the direct writer pays the loss to its assured.

The words "reinsurance" and "reinsure" have well recognized meanings. They relate to the cession by one insurance company to, and the assumption by another of, all or part of a risk undertaken by the former. The words are instinct with a promise by the reinsurer to indemnify the ceding or reinsured company against liability on its original risk as to the whole or a *pro rata* portion thereof. If the meaning of these terms is to be changed from their universal interpretation of insurance against liability, to indemnity against loss, the intention of the parties to do so should be demonstrated clearly and unequivocally.

No intention to make such a change in the case at bar is patent. Furthermore, the agreement and the circumstances surrounding and preceding its nascency, together with the countless authorities bearing on the question, establish conclusively that the parties intended to follow the construction which had been placed on reinsurance contracts from time immemorial, and that, in letter, as

well as in spirit, the agreement in question is one to insure against liability and not to indemnify against loss.

Allemannia Fire Ins. Co. v. *Firemen's Ins. Co.*, 209 U. S. 326, is directly in point. The plaintiff had issued its policy of fire insurance and had reinsured a portion of its risk with the defendant company. The plaintiff's assured suffered a loss, and before such loss or any part thereof was paid, the plaintiff was rendered insolvent by reason of heavy losses sustained in a great fire in the City of Baltimore in February, 1904. A receiver was appointed for the plaintiff by reason of such insolvency, and he instituted an action against the defendant to recover the proportionate share of plaintiff's liability. Defendant contended that the receiver had paid a dividend of but 55 percent of its liability and maintained that it was liable only for the proportionate share of the loss *actually paid* and not that for which the plaintiff became liable to its assured. Mr. Justice PECKHAM, who wrote the unanimous opinion for the Court, said (p. 332):

> "The term 'reinsurance' has a well-known meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed 'double insurance', i.e., an insurance of the same interest. The contract is one of indemnity to the person or corporation reinsured, and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured * * *. *The claim of the reinsured rests upon its liability to pay its loss to the original insured, and is not based upon * * * ability to pay* * * *." (Italics ours.)

This Court reaffirmed that rule later and held further that *the amount that the reinsured will eventually pay is*

neither a complete nor partial defense to an action brought against the reinsurer upon its contract.

> "There is a further contention that, because the United has not paid to its creditors any part of the amounts due on its contracts, and is likely to pay only twenty-five cents on the dollar, the Munich is under no liability to pay to it anything on account of the losses incurred thereunder or, in any event, more than a *pro rata* share of the payments actually made by the United. The Munich became a reinsurer. *The liability of a reinsurer is not affected by the insolvency of the reinsured company or the inability of the latter to fulfil its own contracts with the original insured.*" (Citing cases.) (Italics ours.)
>
> *Hicks* v. *Poe*, 269 U. S. 118, 120-121.

The theory of the petitioner, if adopted, would change in its entirety the well settled law of reinsurance and leave in its wake the utmost confusion. It would, for example, result in an effect entirely unprecedented with regard to a company which had reinsured all of its outstanding business, transferring the whole of its assets to the reinsuring company as a consideration for such reinsurance. If the argument of the petitioner were advanced to a logical conclusion, the reinsurer would have received all of the assets of the direct writer as consideration for a promise which it could never be called upon to fulfill because the reinsured would have no assets with which to satisfy the loss of an assured. Its inability to satisfy such a loss and produce proof of payment thereof, would relieve the reinsurer from its obligation to the reinsured, to the detriment and prejudice of policyholders of the reinsured, who could in no event recover against the reinsured.

> *Morris & Co. et al.* v. *Skandinavia Insurance Co.*, 279 U. S. 405.
> 14 *R. C. L.* 1452.
> 8 *L. R. A.* (N. S.) 862.

One of the earliest cases on the subject of reinsurance in this country is *Hone* v. *Mutual Safety Ins. Co.*, 3 N. Y. Super. Ct. (1 Sanf.) 137, (affd. 2 N. Y. 235), cited with approval by this Court in the *Allemannia* case, *supra*. Judge SANFORD delineates therein the history of the subject and says (p. 145):

> "For more than two centuries, the conduct of reinsurance has been well known, and its principles firmly established; and we have not met with a single treatise or decision which deviates from the uniform doctrine maintained on the point in question."

The opinion points out that reinsurance contracts were for a long time illegal in England because they were thought to encourage speculation in the rise and fall of premiums and that all of the ancient treatises were by French jurists. He cites Emerigon as the highest authority, and the subject "of the eloquent eulogy of Chancellor Kent", and continues (p. 145):

> "That in case of loss, he (the reinsurer) is held to pay the whole amount for which he is reinsurer without any regard to the circumstances that the reassured may have procured an abatement from the first assured, or may be unable because of bankruptcy to pay the latter in full."

And later (p. 146) states:

> "the same principle is maintained in this country".

In *Blackstone* v. *Allemannia Fire Ins. Co.*, 56 N. Y. 104, the Court of Appeals of the State of New York commended Judge SANFORD'S opinion in the *Hone* case, *supra*, and said (p. 107):

> "In regard to the latter branch of the clause in question, which says that the loss is payable 'at the same time with the reinsured', it is not possible to conclude from it that actual payment by the reinsured is, in fact, to precede or to accompany pay-

ment by the reinsurer. It looks to the time of payability and not to the fact of payment * * *. *To give to it the construction contended for by the defendant would, in substance, subvert the whole contract of reinsurance as hitherto understood in this State.*" (Italics ours.)

In *Herckenrath* v. *American Mutual Insurance Co.*, 3 Barb. Ch. (N. Y.) 63, the reinsurer was held (reporter's headnote) "bound to pay the amount which the original insurer becomes legally liable to pay to the assured in consequence of the risk assumed and not merely the amount which the original insurer actually pays in consequence of the risk assumed by him".

Corpus Juris, in discussing the right of an insolvent reinsured to recover the proportionate share of its liability from a solvent reinsurer, sets forth the rule:

> "The liability of the reinsurer is not affected by the fact that reinsured is insolvent and unable to fulfil his own contract with the person originally insured, the reason being that the *claim of reinsured on the reinsurer rests on the former's liability to pay the loss to the person originally insured, and not on the quantum of his ability to pay it. This is true, notwithstanding a condition in the policy of reinsurance that, in case of loss, the reinsurer shall pay pro rata at the same time, and in the same manner, as reinsured.* And, even though the original insured has received but a small dividend from the estate of the insolvent insurer, the reinsurer is nevertheless liable to pay reinsured's trustee or receiver the whole amount of the reinsurance, and this without deducting the dividend. This also is true even where the reinsurance policy contains the reinsurance clause, for this clause does not prevent reinsured from recovering from the reinsurer as soon as the loss happens and before the former has paid his losses." (Italics ours.)

33 *C. J.*, p. 57, Sec. 734.

A text writer defines the reinsurer's obligation as follows:

> "The reinsurer agrees to indemnify the assured not against payment actually made, but against liability actually incurred; therefore it is by no means that the insurer shall first have paid a loss incurred as a condition precedent to his demanding payment of the reinsurer."
>
> *Vance on Insurance*, 2d Ed. 1930, pp. 942, 946.

Another text writer, under the heading "Accrual of right to sue reinsurer", states:

> "Although the reinsurer is bound under a valid contract of reinsurance, when the reinsured has been found liable or the loss adjusted, the latter may wait until suit has been brought and judgment obtained by the insured before seeking such indemnity from the reinsurer. Furthermore, before the reinsured can recover, it must show either that it has paid a claim under a risk carried by it upon the subject insured, and which has been destroyed or damaged by a cause insured against, or that it has become liable to pay the same, for *it is not necessary that the insured should have paid the loss before proceeding against the reinsurer, it being permissible to bring suit as soon as the liability occurs*, at least where the contract is one of indemnity against the liability of the insurer for loss, it being sufficient that such liability to pay for the loss exists, since *such a contract does not go to the insurer's payment of, or ability to pay, the loss.* For instance, where a company transfers its stock to a reinsuring company upon a guaranty that its obligations to its policyholders shall be fulfilled, some liability to such policyholders must accrue before any action lies upon such guaranty, but when the reinsurer passes into a receiver's hands, and the claims of the policyholders are presented and established, the guaranty should be turned into assets to meet the claims of creditors." (Italics ours.)
>
> *Couch's Cyc. of Insurance Law*, Sec. 2277, Vol. 8.

Mr. Cooley in his *Briefs on Insurance* says:

> "The liability of the company reinsuring accrues at the same time with the liability of the reinsured (Blackstone v. Alemannia Fire Ins. Co., 4 Daly [N. Y.] 299), and **it is not necessary for the reinsured to pay the loss to the first insured before proceeding against the reinsurer.**" (Emphasis ours.)
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> *Cooley's Briefs on Insurance* (2d Ed.), p. 6750, Vol. 7.

The subject was discussed in the November, 1936, issue of the *Harvard Law Review*, where it was said:

> "The contract of reinsurance has been universally construed as a contract of indemnity against liability rather than one against loss. Hence the liability of the reinsurer to the reinsured accrues immediately upon the reinsured's becoming liable to the insured. Payment of the insured is, therefore, not a condition precedent to the reinsured's right of recovery, and as a result the insured may avail itself of that asset of the reinsured by garnishment. Ordinarily the question of recovery by the insured against the reinsurer becomes important only in cases where the reinsured is insolvent. Although the insolvency of the reinsured has prevented it from paying the insured more than a fraction of its claim, the courts which have dealt with the problem, partly because of an apprehension of mathematical difficulties giving rise to a multiplicity of suits, but mainly following the logical implications of the rule that payment of the insured is not necessary to recovery by the reinsured, have unanimously held the reinsured's right of recovery unaffected by its insolvency."
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> 50 *Harvard Law Review*, pp. 95-96.[1]

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[1] The "mathematical difficulties giving rise to a multiplicity of suits" referred to, would follow petitioner's revolutionary theory. The Liquidator could only recover from the reinsurer its proportionate share of every dividend *after* payment by him. Each dividend payment would signal the institution of a new suit against the reinsurer.

"If the assignee can only recover from the defendant when and as he pays dividends on the assigned estate, to the original insured, it is plain an

The petitioner brushes aside the *Allemannia* case and other authorities referred to here and in the opinions of the Courts below, respectively, asserts that they do not control and avers that the agreement upon which this action is predicated differs from the reinsurance agreements in the cited cases. The contention is a specious one. Those agreements may differ in appearance or verbiage, but are one in substance, in effect and in intent with the agreement in the instant case.[1]

The contract of reinsurance in the *Allemannia* case, *supra,* does not differ in substance from the contract of reinsurance in the case at bar, and the pertinent clauses are hereinafter set forth in parallel columns to illustrate the similarity between the contracts of reinsurance in the instant case and in the *Allemannia* case, *supra,* as compacts of indemnity against *liability* for loss and not against loss.

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endless number of suits must be the consequence; and if it has so happened that there was no assigned estate, there would be no recovery at all. I would construe the words 'as the latter company may pay' to mean 'as the latter company may be liable to pay'." (*In re Fame Ins. Co., Nisi Prius,* Sharwood, J., affd. *In re Fame Ins. Co. Appeal,* 83 Pa. 396, 398.)

An attempt to overcome the mathematical difficulties was made in an article (15 *Harvard Law Review* 866 [1902]) which was intended to present a solution of the difficulty involved in the multiplicity of transactions by the use of a mathematical formula to determine the amount of reinsurance *collectible.* It was conceded the formula, if workable, was applicable only if the doctrine of reinsurance as universally accepted was interpreted as indemnity against loss rather than indemnity against liability. The impracticability of any such formula is apparent by the wide gap existing between computing the amount "collectible" and amount "collected". If the amount collectible from the "A" company is $10,000 and a computation is based thereon in accordance with the formula, and the "A" company before that amount is collected becomes insolvent so that the $10,000 cannot be collected and only a small uncertain dividend in the far distant future is in view, or becomes recalcitrant and refuses to pay, thereby involving unforeseen legal expenses as well as delays, or interposes various defenses and offsets which will take years to litigate and makes the result of such action uncertain, what would happen to the computation? Multiply this instance a few hundred or thousand times and absolute chaos results. The exact and immediate justice that the formula was intended to work out would be absent.

[1] The very agreement sued upon here (R. 47) was passed upon by the Circuit Court of Appeals, Fourth Circuit, as late as 1934, and was held to be one of insurance against liability and not against loss. *United States in Use, etc.* v. *Federal Surety Co. et al.,* 72 Fed. (2d) 964, 967.

Contract of Reinsurance in the Allemannia Case.

"10. Upon receiving notice of any loss or claim under any contract hereunder reinsured, the said reinsured company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, of the same, and of the date and probable amount of loss or damage, and after said reinsured company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, a proof of its loss and claim against this company, upon blanks furnished for that purpose by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and, upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

"11. Each entry under this compact, unless otherwise provided in this contract, shall be subject to the same conditions, stipulations, risks and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions, as paid by

Contract of Reinsurance in the Instant Case.

"4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer prompt written notice thereof at the Reinsurer's home office. The term 'home office', wherever used herein, shall be deemed to mean the home office in the United States. The Reinsured shall take charge of all matters arising under the bond in connection with claims. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims and defend, settle, or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under some other bond or bonds given at any time by the Reinsured.

the said reinsured company under its contracts hereunder reinsured; and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof."

"The Reinsured's authority to handle and settle claims in accordance with its own judgment as outlined above shall not be annulled, abridged, or otherwise affected, if the Reinsured consults the Reinsurer, by letter, in conference, or otherwise, with reference to such handling and settling of claims; provided that the reservation of rights on the part of the Reinsured effected by this paragraph shall apply only to matters and questions, the sole determination of which is left by this agreement in the hands of the Reinsured.

"If any loss hereunder shall be settled, wholly or in part, through the issuance by the Reinsured of a surety bond, the Reinsurer shall participate in such bond in the proportion defined in section 2 hereof.

"The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date; provided, however, that the Reinsurer in any event shall have a period of forty-eight hours,

> after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond."

In the *Allemannia* case, Clause 10 required prompt notification, in the event of a loss by the assured of a reinsured, and the forwarding to the reinsurer of various papers "and a copy of the original receipt taken upon the payment of such loss."[1] Clause 11 provided that the reinsurance agreement was to be subject to the same conditions, stipulations and risks as were assumed by the reinsured under its original policy "and loss if any shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the reinsured * * * and in no event shall this company be liable for an amount in excess of a ratable proportion of *the sum actually paid* to the assured * * * by the said reinsured company under its original contract hereunder insured."[2]

In the instant case the analogous clause provides that "the reinsurer's proportionate share of a loss under the bond * * * shall be paid to the reinsured upon proof of payment * * * by the reinsured, and upon delivery to the reinsurer of copies of all essential documents * * *." The

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[1] This provision is obviated in the case at bar by the clause that any settlement or adjustment made by the reinsured shall be binding upon the reinsurer (R. 49, lines 58-65), thereby eliminating the necessity for a proof of loss or the "receipt taken upon the payment of such loss".

[2] In the *Blackstone* case, *supra*, the reinsurance contract provided: "Loss, if any, payable *pro rata* and at the same time with the reinsured." It was there held that the contention that the reinsurer was not compelled to pay its share, except contemporaneously and simultaneously with the reinsured, was not tenable.

A similar clause in another contract of reinsurance was construed the same way, the Court ruling that insolvency is no defense to a suit against the reinsurer, that the "condition means that the defendant shall pay at and in the same time and manner as the reinsured company shall pay or be bound to pay according to its policy." *Cashau* v. *Northwestern Nat. Ins. Co.*, 5 Biss. 476, Fed. Cas. No. 2499 (C. C., E. D. Wisc.).

reinsured is required to give prompt written notice of any claim. The requirement as to the forwarding of papers or documents is omitted and, in place thereof, the reinsured is given *carte blanche* with respect to the settlement of any claim except "that no payment or other method of settlement by the reinsured shall preclude the reinsurer from showing that the *alleged liability or any part thereof for loss* under the bond exists or existed under some other bond or bonds given at any time by a reinsurer" (R. 47, lines 64-65).

As in the *Allemannia* case, where the liability of the reinsurer was limited to a ratable proportion *"of the sum actually paid"*, so in the case at bar the reinsurer's proportionate share of the loss is required to be paid upon "proof of payment". The provision in the *Allemannia* case requiring a receipt for the payment of the loss to be produced when demand was made for the proportionate share by the reinsured evoked this explanation by Mr. Justice PECKHAM (p. 337):

> "that if the loss or claim has been in fact paid, then a copy of the receipt is to be sent; but *it does not mean that there must be payment before any liability on the part of the reinsuring company exists.*" (Italics ours.)

To the same effect:

> *Yonkers & New York Fire Ins. Co.* v. *Hoffman Fire Ins. Co.*, 29 N. Y. Super. Ct. [N. Y.] 316.

The petitioner argues that an exception to the requirement for payment is contained in the agreement in the case at bar by that portion which permits the reinsured to give written notice of intention to pay the loss and requesting payment of the reinsurance by such date; that under the construction of both Courts below this clause is surplusage, because if the reinsured could demand payment of the reinsurer without being required to pay as a condition precedent, such a clause is wholly unnecessary.

The petitioner misconstrues the purpose of that clause. Its aim is not to give a means to the reinsured of requiring payment without first paying the loss itself. Its value lies in the elimination of book entries by reinsureds and being compelled to carry a system of debits and credits with reinsurers. It is not surplusage and is not intended as an alternative method, but rather as a convenience. Clearly, it does not and cannot apply to an insolvent company in liquidation, because no notice of that kind could in good faith be given by a liquidator or receiver, for the carrying out of any such intention would involve an unlawful preference. The giving of notice with no intention of carrying it out would be looked at askance, and if carried out, would be subject to attack for illegality.

To further illustrate the speciousness of petitioner's contention, let us assume that the reinsured as a going company had given notice to the reinsurer of intention to pay, etc., and that the reinsurer had, pursuant thereto, forwarded a check for its share directly to the obligee of the reinsured, or to the reinsured in favor of the obligee of the bond; that upon the receipt thereof the reinsured had sent its draft for the balance of the loss, together with the draft of the reinsurer, to such obligee; that before the check of the reinsured cleared, an insolvency petition was filed against the reinsured, a receiver appointed, and its bank account attached, as a result of which the obligee was able to cash the reinsurer's check alone and to content himself with filing a claim against and receiving not the full amount of the balance of his loss, but dividends thereon from the reinsured. What claim would the reinsurer have had either against the obligee or against the reinsured?

The petitioner as reinsurer is placed in no less advantageous position now than it would have been had it been requested to pay its share of the risk to the reinsured if the latter had continued in business. *It is only being called upon to pay that which it agreed to pay for a premium without regard to the ability of the reinsured to pay its assured.*

The precursor of the "Standard Form of Reinsurance Agreement adopted by the Surety Association of America, 1-15-30" (R. 47), involved in the instant case, was the "Standard Form of Reinsurance Agreement adopted by the Surety Association of America, May 12, 1915" (R. 49), but seven years after the handing down of the *Allemannia* decision by this Court. The language of that agreement with respect to the giving of notice of intention to pay is almost precisely the same as is used in the agreement sued upon. Parallel columns are employed in order to show the similarity:

Language Used in the Standard Form of Reinsurance Involved in the Instant Case.	Language Used in the Standard Form of Reinsurance Agreement Adopted in 1915.
"• • • The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date; provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond" (R. 47, lines 74-79).	"• • • The Reinsured may, however, give the Reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to pay its proportionate share of such loss before such date; but in that case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond" (R. 49, lines 36-39).

And, just as the agreement in the case at bar "does hereby reinsure • • • against loss", so also the Standard Form of Agreement adopted in 1915 "does hereby reinsure • • • against loss". The corresponding provisions of these two agreements are subjoined in parallel columns:

Language Used in the Standard Form of Reinsurance Involved in the Instant Case.

"IN CONSIDERATION of the premium payable under section 1 hereof

hereinafter called the REINSURER, does hereby reinsure FIDELITY AND DEPOSIT COMPANY OF MARYLAND, hereinafter called the REINSURED, under bond numbered , together with all riders attached thereto, hereinafter called the BOND, issued by the Reinsured in the penalty of Dollars, in favor of (obligee), and in behalf of , hereinafter called the Principal, against loss thereunder and against costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement" (R. 47).

Language Used in the Standard Form of Reinsurance Agreement Adopted in 1915.

"IN CONSIDERATION of the premium stated in section 1 hereof , hereinafter called the Reinsurer, does hereby reinsure the Fidelity and Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered hereinafter called the bond, issued by the Reinsured in the penalty of Dollars, in favor of (obligee) and in behalf of (principal), against loss thereunder and against costs and expenses, as hereinafter defined. A copy of the bond is or is to be attached hereto, and is hereby made a part of this agreement" (R. 49).

There are other similarities too numerous to mention, which are apparent from a most cursory examination. The agreement sued upon (R. 47) is merely an amplification of the 1915 Standard Form (R. 49). Fundamentally and basically, they are the same.

The 1915 Standard Form was judicially considered in 1923, seven years before the Standard Form involved in the present case was adopted. *This twin brother of the agreement involved in the case at bar was held to be an agreement to insure against liability and not against loss, the Court holding that recovery could be had by the receiver of an insolvent reinsured without prior payment*

of the loss, under that agreement, and that such recovery from the reinsurer was for the benefit of general creditors:

> "The right of the receiver to recover is challenged upon the ground that the insolvent surety has discharged no part of its liability upon the bond executed for the benefit of appellee, and that, as it has suffered no loss, no recovery can be had in the name of the receiver. The contrary appears to be the well-settled rule. The reinsurance contracts are contracts of indemnity, and the receiver *is entitled to recover under the issues and facts of this case, either, for the benefit of general creditors without the prior payment of the loss insured upon the bond.*" (Italics ours.)
>
> *Globe Nat. Fire Ins. Co.* v. *American Bonding & Casualty Co.*, 198 Iowa 1072.

The case of *Royal Ins. Co.* v. *Vanderbilt Ins. Co.*, 102 Tenn. 264, cited by the petitioner as an authority for *its* interpretation of the word "loss" in reinsurance agreements, is of interest in illustrating the wisdom of the opinions below in the case at bar. The construction of the word "loss" there, revolved about a clause in the reinsurance agreement barring an action by the reinsured for recovery of any claim "* * * unless such action shall be commenced within twelve months next ensuing after the loss shall occur". The petitioner there urged that the loss referred to was the loss of the primary assured, and such loss having occurred more than twelve months prior to the institution of the action by the reinsured against the reinsurer, the reinsured was out of court. The Court said (p. 270):

> "Its contention is that the loss it insured against was a loss by fire. This is a mistake. *It indemnified, to a limited extent, against the liability which the first insurer assumed by his contract,* * * *.*" (Italics ours.)

The similarity of the reinsurance agreement in the *Allemannia* case with the Standard Form of 1930 involved

in the present case (R. 47) and both with the Standard Form adopted May 12, 1915 (R. 49), is most striking and leads to the conclusion that there was no intention on the part of the *Surety Association of America, the sponsors of the Standard Form of Reinsurance Agreement adopted in 1915 as well as that adopted in 1930,* to deviate from or change the rule of law with respect to agreements of reinsurance, which through the centuries had been treated as contracts of indemnity against liability and had been reaffirmed as such by this Court in 1908 in *Allemannia* v. *Firemen's Insurance Co., supra,* and other cases.

The marked resemblance of the 1915 and 1930 Standard Forms of Reinsurance has been commented upon, as has also the fact that the 1915 Standard Form (R. 49) was drawn but seven years after the *Allemannia* decision. Eight years later, in 1923, the Supreme Court of Iowa analyzed the 1915 Standard Form in a controversy wherein the petitioner contended that such agreement was one of indemnity against loss and not against liability. The Court unequivocally held that it was one of insurance against liability, wherein the insolvent reinsured was not required to make payment to the primary assured before seeking recovery from the reinsurer of the latter's proportionate share of the risk.

> *Globe National Fire Insurance Co.* v. *American Bonding and Casualty Co., supra.*

Seven years later, in 1930, the Standard Form of Reinsurance Agreement upon which the instant action is predicated was adopted (R. 47), which, in form as well as in substance, is, with the exception of a few added refinements, precisely the same as was the Standard Form of 1915 (R. 49).

It is submitted that if it had been the intention of the sponsors of the Standard Form of 1915 (R. 49), drawn seven years after the decision of this Court in the *Allemannia* case, or its successor, the Standard Form of

1930 involved herein (R. 47), drawn seven years after the decision of the Iowa Supreme Court in the *Globe* case, *supra,* or if it had been the purpose of the parties to the 1930 Standard Form in the case at bar, to evade or avoid the ruling in the *Allemannia* case, holding that a reinsurance compact was an agreement for indemnity against liability and not against loss, and to evade or avoid the ruling in the *Globe* case that the 1915 Standard Form of Reinsurance Agreement was a contract for indemnity against liability and not against loss, it is reasonable to assume that they would have manifested such intent in unmistakable terms, would not have used the same language as was used in the 1915 Standard Form, *would not even have used the word "reinsure",*[1] and would have squarely said that the parties intended that the reinsurer should not be liable and should not be called upon to pay its *pro rata* share of the loss suffered by the reinsurer, unless and until the reinsured had made payment of the loss to its assured, that the reinsured should only be liable in such an event for its pro rata portion of the amount actually paid; and that *no action could be brought by the reinsurer unless instituted within a certain time after actual payment.*[2]

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[1] This word, so pregnant with the definition of insurance against liability, might have been replaced by the word "indemnify" or other language which had not from the beginning of reinsurance contracts been identified with insurance against liability and *never* with indemnity against loss.

[2] The contention of the petitioner that there was no proof that the Surety Association of America had any knowledge of the *Allemannia* case or the decision of the Supreme Court of Iowa in the *Globe* case, is specious. If an association of surety companies which drew and sponsored an agreement for use by all surety companies in America did not keep itself apprised of such far-reaching decisions which affected so many companies and did not make a search for and consider all adjudications bearing upon such an agreement, what did it do? Who would give any weight to an agreement covering such a widely litigated topic without a study of all the cases theretofore decided and the cases thereafter decided construing the same? The appellate court below commented on this phase of the petitioner's argument and stated that while perhaps such a body did not acquaint itself with the decisions of every state, for which reason the Court forbore relying upon *Globe National Fire Ins. Co.* v. *American Bonding & Casualty Co.,* 198 Iowa 1072, that "it is probable that that decision also was known. * * * But to say that the only decision of the Supreme Court upon the point was not known or was not regarded, seems to us to pass any reasonable possibility" (R. 81).

Clause 9 of the reinsurance agreement sued upon (R. 47) is particularly significant in showing that the parties did not intend actual payment by the reinsured to be a condition precedent to the right of recovery against the reinsurer. It provides that "No action shall be brought against the reinsurer hereunder unless brought within twelve months after the date of the final *settlement* of all obligations under the bond." It does not require final *payment* of all obligations or liquidation of all obligations or discharge of all obligations; *it refers merely to a settlement.* The identical clause is found in the 1915 Standard Form (R. 49, lines 75-76). If "final settlement" in the 1915 Standard Form was not construed to mean payment by the Iowa Court; it is submitted that no basis exists now for changing its meaning or asserting that its transposition, without change of accompanying words, into the 1930 Standard Form has altered its meaning.[1] As used in the earlier Standard Form construed by the Court in other reinsurance agreements and in the reinsurance agreement in the case at bar, the implication carried by the word "settlement" is not that of payment, but of adjustment or fixing of the amount of liability.

The term "final settlement" has been judicially defined as meaning not payment, but a determination of the amount due:

> "It argues that final 'settlement' here means payment. So to hold would run counter to the whole scheme of the agreement between the companies. What the Munich assumed was one-third of the liability * * *. The words 'final settlement', as used in this contract, must be held to mean the fixing by agreement or judicial determination of the amount

[1] Webster's New International Dictionary defines the word "settlement" as the "Act of process of adjustment or determining, composure of doubts or differences. Arrangement, adjustment * * *." The verb "settle" is defined as "To adjust differences or accounts; to come to an agreement * * *." In Bouvier's Law Dictionary, the word "settlement" is defined in contracts as "An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other * * *." The verb "settle" is there defined as "To adjust or ascertain."

due by the United on the bonds or policies for which the Munich assumed a one-third liability."

Poe v. *Munich Reinsurance Co.*, 276 Fed. 949, 953 (D. C. Md.).

In an action involving a liability policy where the question arose as to whether the policy was one of indemnity against liability or loss, the policy was construed as a policy of insurance against liability, in the absence of a clause prohibiting the assured from bringing action thereon unless he had made actual payment of judgment against him thereunder. The Court said:

"If it was appellant's purpose to insure against loss actually sustained and not against liability, it could have made it plain by a 'no action' clause in unquestionable language familiar to insurance companies and to courts."

Barney v. *Preferred Auto, Inc.*, 240 Mich. 199, 208.

Similarly, where a clause limiting the right of action did not refer to *payment*, but provided that "No action by the assured shall be taken against the company until the amount of damages * * * is determined by final judgment", it was held that such a policy was one of insurance against liability and not against loss.

Capelle v. *U. S. Fidelity & Guaranty Co.*, 80 N. H. 481.

The Courts have uniformly held, as above illustrated, that unless the "no action" clause requires *payment* before action may be instituted, in clear and unmistakable language, the policy will be construed as one of insurance against liability and not loss.

The District Court so held in the case at bar when, in discussing the use of this word, it indicated that the word "settlement" could be used in other ways, but that as used in the agreement it meant determination and not the pay-

ment of a liability, and remarked that *"if it had been intended to make actual payment of the claim a prerequisite to recovery where the reinsured was in liquidation, it is reasonable to assume that unequivocal language to that effect would have been used"* (R. 58).

There was nothing particularly novel about reinsured companies becoming insolvent and going into liquidation at the time of the adoption of the 1930 Standard Form involved here. The majority of cases hereinbefore cited and all of the texts which had been written were concerned with the claims of insolvent reinsureds or their receivers against solvent reinsurers and the right of the former to recover the *pro rata* share of risks from the reinsurers *without first making actual payment* to the primary assureds. It is not reasonable to assume that a subject which had been so widely discussed by Courts and text writers did not leave its impress upon the parties and the sponsors of the Standard Forms of Reinsurance Agreement drafted in 1915 and 1930, and cause them, if indeed they wished to evade such a uniform and time-old construction, to manifest their desire in plain language whereby their intent would be the object of no doubt.

The words "final settlement", even divorced from all judicial determinations and definitions, must be construed in the 1930 Standard Form sued upon as a determination of the amount due, or fixation of liability of the reinsured, and not payment.

Clause 4 of such agreement (R. 47, lines 56-84) provides for the giving of notice by the reinsured to the reinsurer of any claim under the bond, taking charge of matters in connection therewith, and contains the language which the petitioner relies upon to sustain its position that the agreement, notwithstanding all other factors and decisions, is one of indemnity against loss rather than liability.

This clause, in referring to the obligation of the reinsured to "take charge of all matters arising under the bond in connection with claims" and to decide its liability, determine the amount thereof, "settle or compromise any

claims and defend, settle or compromise any suits", further provides that "Any such decision, determination, settlement, defense, compromise, or other action of the reinsured * * * shall be final and conclusive and unconditionally binding upon the reinsurer provided that no payment or other method of settlement by the reinsurer shall preclude the reinsurer from showing *that the alleged liability * * * for loss * * * exists* or existed under some other bond * * *" (R. 47, lines 62-65). (Italics ours.)

Can there be anything more conclusive than the clause so quoted in demonstrating that the agreement is one to insure against liability and not against loss? If no right against the reinsurer were to accrue unless and until the reinsurer made payment to its primary assured or suffered an actual loss, this provision would be utterly inane, because the reinsurer would never be called upon to show that the *"alleged liability * * * for loss* under the bond *exists * * * under some other bond * * * given at any time by the Reinsured"*; the reinsured, having made no payment, could not press its claim against the reinsurer and create the necessity for the interposing of such a defense. The clause refers to the reinsured's "alleged liability or any part thereof for loss under the bond" and unequivocally shows that the parties and the draftsmen of the agreement contemplated a claim or suit by the reinsured against the reinsurer, *not after payment* by the reinsured of a loss under its bond, *but while an alleged liability for loss "exists"*.

It will be further noted that the words "settlement" and "payment" are treated as separate and distinct nouns in the agreement and convey two separate and distinct methods of fixing the amount of the reinsured's liability which in turn fixes the reinsured's liability (R. 47, lines 62-65).

Further evidence of what the parties and the draftsmen of the agreement intended may be found in Section 12 of the agreement sued upon, where reference is made to the reinsurer's liability "on account of any losses", the losses contemplated being those of the *assured* of the re-

insured for which the reinsured might become liable (R. 47, lines 136-138). Provision is further made for liability "for losses which occurred before the effective date of the cancellation of such superseded reinsurance, notification of which was not received by the reinsured" (lines 148-151). The satisfaction of that liability to the reinsured is deferred only to the time when the amount of the liability of the reinsured becomes fixed and determined. Nothing therein requires payment as a prerequisite.

Under Clause 14 every premium payable by the reinsured to the reinsurer is an absolute obligation whether or not the reinsured shall collect from its own debtor the premium on the bond (R. 47, lines 170-171), and "The validity of this agreement shall be in nowise impaired or affected by the failure of the Reinsured, for any cause to pay the Reinsurer either the initial premium or any subsequent premium due from the Reinsurer to the Reinsured" (R. 47, lines 183-184).

Still further evidence of the intent of the parties and the draftsmen is found in the clauses wherein the parties agree to divide salvage which the reinsurer may recover in the proportion that each bears to the risk (R. 47, lines 124-125, 16-21).

The petitioner has misconstrued these provisions and contends that because they fix the division of salvage in the proportion of their respective risks, it follows that the reinsurer's obligation is limited to payment of its proportionate share of the amount paid by the reinsured, because the purpose is to give them "proportionate reimbursement for their respective contributions".

In its deduction, petitioner clearly errs. Indemnity agreements commonly exacted by surety companies as collateral security are agreements to indemnify against liability and not against loss; and in the liquidation of insurance companies, thousands of such indemnity agreements have been sued upon where the liability became fixed, long before the payment of any dividend was ever made or contemplated.

The provisions with respect to salvage not only do not indicate that the reinsurer's liability to the reinsured is dependent upon actual payment by the latter, but are convincing proof to the contrary.

The agreement provides that "The Reinsurer shall be entitled to share with the Reinsured in the proportion defined in section 2 hereof any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond. The Reinsurer and the Reinsured shall share any salvage or recovery * * * in the proportion defined in section 2 hereof" (R. 47, lines 124-127). Section 2 provides that "The Reinsurer's total liability hereunder is limited to * * *; but the Reinsurer shall in no event be liable for a greater proportion * * * than the proportion that the amount of reinsurance bears to the amount of the bond" (R. 47, lines 16-20). (The bond referred to is the bond issued by the reinsurer to its primary assured [R. 47, lines 4-10].)

It is significant that the salvage to which the reinsurer is entitled *is not limited in amount* and it is given the right to share therein in *"the proportion* that the amount of reinsurance bears to the amount of the bond".

If the position of the petitioner were sustained, it might lead to such reinsurer being compensated and enriched far beyond any loss which it might sustain, for its liability would be measured by the amount of dividends paid by the liquidator of the reinsured, whereas it would have the right to salvage for a proportionate share of its *liability* under the bond regardless of the amount which it paid.

Translated into concrete terms, if the liquidator was to recover salvage of $7,000 under an indemnity agreement wherein the indemnitor agreed to indemnify the direct writer (reinsured) against liability, the reinsurer would be entitled to receive the sum of $3,500, which would be its proportion of the salvage recovered, based upon its 50 percent liability under the agreement. If

the liquidator only paid a first and final dividend of 20 percent to general creditors, assuming that the loss of the primary assured was $7,000, and the payment of the liquidator to the primary assured was but $1,400, the reinsurer's share of the loss would be but $700. It would, therefore, make a profit of $2,800 on the transaction in addition to having received and retained a premium from the reinsured in consideration of its reinsuring the risk. Such a situation would hardly be consonant with the theory of reinsurance, the profit in which is presumed to lie in the premium, and salvage in which is intended to minimize loss and not enrich the reinsurer.

This brings the writer to another phase of petitioner's argument. It urges that an affirmance of the judgment of the Court below will permit the Southern to realize a profit out of the reinsurance which would be inconsistent with the fundamental principles thereof and, in support of such contention, it cites the case of *Castellain* v. *Preston*, 11 Q. B. D. 380, which is not applicable to the case at bar, involved no reinsurance and stands for the proposition that a marine or fire insurance policy is a contract of indemnity only, under which a loss shall be fully indemnified and never more than fully indemnified. Of course, no quarrel can be had with the rule of law so enunciated. The case at bar is not concerned with a marine or fire policy or any other kind of a policy such as there described. It revolves about a reinsurance agreement which is *not* a policy of insurance.

Cunningham et al. v. *Republic Insurance Co. et al.*, 127 Texas 499.

Aetna Casualty & Surety Co. et al. v. *International Reinsurance Co.*, 117 N. J. Eq. 190.

Nor does the question of profit at all enter. The *Southern* cannot make a profit. It is dissolved and out of business and its affairs and estate are being administered by the Superintendent of Insurance of the

State of New York, as liquidator thereof, for the benefit of creditors (R. 25).

In the case of an insolvent reinsured, the recovery of the full share from the reinsurer is not barred by the fact that the reinsured has not paid or will not pay its creditors or its primary assured mentioned in the reinsurance agreement in full (see citations and authorities, *supra*).

Certainly, there is no reason, let alone a good reason, why the petitioner should be permitted to take advantage of the misfortune of the reinsured. The latter in no way failed to perform any of the terms, covenants and conditions of the contract between the insolvent company and the reinsurer on the part of the insolvent company to be performed (R. 23).

Precisely why the petitioner, with respect to whom all the terms and conditions of the contract have been performed, should be privileged to take advantage of the misfortune of the reinsured, *which has in no way affected it, is difficult to comprehend.*

The petitioner entered into a reinsurance agreement under which it received a premium from the reinsured as a consideration for assuming the proportionate share of a risk up to and not exceeding a certain amount. A loss under the bond issued by the reinsured having occurred, the reinsurer is only being called upon to do that which it agreed to do for a consideration, viz: pay its proportionate share of the risk.

Why should the reinsured's misfortune, which has in no way injured the reinsurer and has not tended to diminish or wipe out the consideration which the latter received, excuse such reinsurer from the performance of the agreement?

> "• • • The original contract of insurance remained as at first, and the reinsurer came under no contract obligation to the owner of the property described in it. The subsequent act of the insurer did not create any. *Its own risk was the sole object of*

reinsurance and formed the consideration of a new and independent contract, distinct from and unconnected with the original insurance. This is so stated in the policy of reinsurance. It covers in terms the plaintiff's 'interest as insurers' under their policy; *and that alone is made the subject-matter of insurance.*

When, therefore, the Paterson Company was found to be legally liable upon its contract and the amount was ascertained, *it was not open to the reinsurer to inquire into the merits of those questions. They were at once bound to pay the reinsured such a proportion of the loss as their reinsurance bore to the sum originally insured.*" (Italics ours.)

Jackson v. *St. Paul Fire and Marine Ins. Co.*, 99 N. Y. 124, 129-130.

The reinsurer is liable in such a case, even though it received no consideration and might receive nothing therefor, because the reinsurance was linked with a participation contract under which the reinsurer received no premium, but participated in the profits and shared the losses.

Hicks v. *Poe*, 269 U. S. 118.

The money recovered is not for the benefit of the reinsured, but for the benefit of the general creditors.

Royal Ins. Co. v. *Vanderbilt*, 102 Tenn. 264.
Globe Nat. Fire Ins. Co. v. *American Bonding & Casualty Co.*, 198 Iowa 1072.
U. S. in Use, etc. v. *Federal Surety Co.*, 72 F. (2d) 964, 967 (C. C. A. 4th Cir.).

The petitioner advances the further contention that the construction placed upon the reinsurance agreement would permit and induce the liquidator of an insolvent company to concede liability for unfounded claims so as to make a profit by collecting the full *pro rata* share from the reinsurer and thus deprive the reinsurer of protection;

that it will remove any necessity on the part of the liquidator to resist unfounded claims and enable him to make a profit for the defunct company; that the motive underlying the requirement to exercise diligence in protecting the reinsurer would thus be swept away.

The propriety and validity of the allowance by the Liquidator to the assured of the direct writer has been conceded (R. 24) and the *bona fides* of his act is not in issue.

The language of the reinsurance agreement (R. 47) which makes the "decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond * * * final and conclusive and unconditionally binding upon the reinsurer" (R. 47, lines 62-63), does not and cannot by the widest stretch of the imagination be interpreted so as to preclude the reinsurer from resisting payment to the reinsured (or, in the case of insolvency, to the receiver) on the ground of fraud or negligence.

Assuming, *arguendo,* that the purpose of the agreement is to give the reinsured a motive to exercise diligence in protecting the reinsurer from unfounded claims, as is contended by the petitioner, this motive is not nullified by insolvency, but is merged in the higher and broader motive *and duty* of a receiver or liquidator to resist all unfounded claims, not merely for the benefit of the reinsurer or the reinsured, but for the benefit of all creditors of the reinsured and others interested in the estate thereof. If he does not perform his duties in the manner expected of him, and is guilty of fraud or negligence as a result of which the reinsurer is called upon to pay, as its proportionate share of the risk, an amount which might have been considerably less had the receiver or liquidator performed his duty and not been guilty of negligence or fraud, is it not obvious that payment could be resisted and the receiver or liquidator called to account by the reinsurer and the creditors of the insolvent company? The insolvent company in such an event is no more. Any

motive which it might have had in allowing unfounded claims no longer exists. The receiver or liquidator would not benefit by any such negligence or fraud, and would leave himself open to personal liability for any such acts; any moneys recovered by him would inure not to his benefit, but to the benefit of the general creditors of the defunct company.

An express prohibition against fraud may be found in the provision that "This agreement shall be regarded by the parties hereto as an honorable engagement rather than a mere legal obligation * * * " (R. 47, line 185). The District Court referred to this clause as one of the *indicia* of the parties' intent "that no departure from the settled law of the *Allemannia* case was intended" (R. 57).

A reinsurance contract, under all the authorities and texts hereinbefore cited, has been universally accepted and construed as an agreement on the part of a reinsuring company to indemnify a reinsured company against liability on a risk assumed by the latter to its primary assured. The language of the reinsurance pact in the case at bar, and the intention of the draftsmen thereof and the parties thereto, conclusively demonstrate that it was never intended that any fanciful theory or strained construction or interpretation should change or cause any deviation from the well recognized rules and principles of reinsurance as agreements to indemnify against liability and not loss in this and other cases where the 1930 Standard Form is employed.

CONCLUSION

The judgment below should be affirmed with costs.

October, 1937.

Respectfully submitted,

ALFRED C. BENNETT,
IRVIN WALDMAN,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1936—No. [redacted] 38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Respondent.

MOTION OF SURETY ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

ALLAN C. ROWE,
ERNEST L. WILKINSON,
Counsel for Surety Association of America.

IN THE

Supreme Court of the United States

October Term, 1936—No. 943

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,
against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,
Respondent.

COMES NOW the Surety Association of America, by its counsel Allan C. Rowe and Ernest L. Wilkinson, and moves this Court for leave to file a brief as *amicus curiae* in the above-entitled cause, for the following reasons:

The decision of this Court upon the petition for a writ of certiorari will be of great importance to the forty-two surety companies which comprise the membership of the applicant Association. The case turns on the construction of a standard form of reinsurance agreement which was prepared and promulgated by the Association and has been adopted by all its members. The question involved in the case has arisen in the liquidation of several insolvent surety companies which have used the standard form to reinsure many of their risks with members of the applicant Association.

The brief of the *amicus curiae* does not argue the merits of the case but merely sets forth reasons why the petition for a writ of certiorari should be granted.

The applicant Association has notified counsel for the petitioner and counsel for the respondent of its intention to make this motion. Counsel for the petitioner have expressly consented to the filing of a brief by the applicant as *amicus curiae,* while counsel for the respondent has stated in writing that he has no objection to the same.

Dated, this 21st day of May, 1937.

ALLAN C. ROWE,

ERNEST L. WILKINSON,

Counsel for Surety Association of America.

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FILED
MAY 24 1937
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IN THE

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Respondent.

MOTION OF SURETY ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

Ernest L. Walbridge

ALLAN C. ROWE,

Counsel for Surety Association of America.

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IN THE

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

The undersigned, as counsel for the Surety Association of America, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

ALLAN C. ROWE,
Counsel for Surety Association of America.

IN THE

Supreme Court of the United States

October Term, 1936—No. 943

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,
against
LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,
Respondent.

BRIEF OF SURETY ASSOCIATION OF AMERICA AS *AMICUS CURIAE*

Statement

SURETY ASSOCIATION OF AMERICA, which submits this brief, is an association composed of forty-two companies engaged in the surety business and transacting annually over ninety per cent. of the total surety business carried on by companies organized in the United States.

One of the purposes of the Association is to regulate and standardize the forms employed by its members in their dealings with the public and with each other, to the end of securing both a uniform system of transacting business and certainty and definiteness in the meaning and interpretation of their contracts.

In the present day insurance of surety risks the element of reinsurance is of paramount importance. In the year 1936 the members of the Surety Association licensed to do business in New York received in premiums (not including reinsurance accepted) $76,057,391 and paid out of that sum to reinsuring companies $20,578,424 in premiums for reinsurance, thus indicating that twenty-seven per cent. of the annual business was reinsured. Many States have enacted laws which require the reinsurance of all uncollateralized risks in excess of a certain percentage of the insurer's assets. A few of such States permit the original insured to recover directly upon such reinsurance contracts if the original insurer becomes insolvent, but in twenty-six States and territories the original insured has no remedy over against a solvent reinsurer, even though the reinsurance was required by statutory enactment. In addition to such compulsory reinsurance, most insurance companies voluntarily reinsure a large portion of their risks, to secure greater distribution of losses and consequent stability. In many cases insurance carriers refuse to assume a risk unless satisfactory reinsurance for a large percentage of the liability can be secured.

To meet this situation the Surety Association prepared in 1930 the Standard Form of Reinsurance Agreement involved in the instant case and recommended its use to all members of the Association. It has been adopted by all of them.

As a result of the financial crisis recently experienced seventeen former members of the Surety Association have been forced into liquidation of some sort and are now in the hands of liquidators or receivers. Prior to their insolvency these insurers reinsured a large percentage of their risks with other members of the Association using the Standard Form employed in the instant case. Such re-

insurance in favor of insolvent insurers involves in the aggregate very large sums and covers every possible type of risk in all parts of the United States.

It is of the utmost importance both to the liquidators of the insolvent companies and to the solvent reinsurers, to secure from this Court a final construction of the meaning and effect of the standard reinsurance contract involved and particularly as to whether such contract differs in its meaning and effect from the contract which was construed in *Allemannia Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326. This is peculiarly so because of the apparent dependence of some courts upon the decision of this Court in the *Allemannia* case as settling forever all possible rights and liabilities which can or may arise from any form of reinsurance.

It is respectfully submitted that it cannot be urged that the remedy lies in the adoption by the Surety Association and its members of a new form of contract definitely excluding the construction adopted in the *Allemannia* case. Any new form of contract with more positive terms could not apply to the present mass of claims and litigations with which the members of the Surety Association are now faced.

WHEREFORE, Surety Association of America, as *Amicus Curiae*, respectfully prays that the petition of the Fidelity & Deposit Company of Maryland for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit be granted.

Dated New York, May 21, 1938.

Ernest L. Wilkinson

ALLAN C. ROWE,
Counsel for Surety Association of America, Amicus Curiae.

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IN THE

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OCTOBER TERM, 1937.

No. 38.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,
Respondent-Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION OF RESPONDENT FOR REHEARING.

ALFRED C. BENNETT,
IRVIN WALDMAN,
Counsel for Respondent-Petitioner.

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IN THE

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LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,
Respondent-Petitioner.

PETITION OF RESPONDENT FOR REHEARING.

To the Honorable, the Supreme Court of the United States:

Pursuant to Rule 33 of the Rules of this Court, the respondent, Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, does hereby petition this Honorable Court for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

This Honorable Court on December 6, 1937, reversed the judgment of the Circuit Court of Appeals, Second Circuit, which had unanimously affirmed a judgment of the United States District Court for the Southern District of New York.

In the written opinion of the Court, three reasons were assigned for such reversal, which reasons, with the utmost deference, it is respectfully submitted, were based on:

(1) An inadvertent misquotation of the language of the agreement sued upon, which caused error in the application of the law,

(2) a misapprehension of the pertinent portions of the Allemannia agreement relied upon to show the similarity of that agreement to the agreement sued upon, which likewise caused error in the application of the law, and

(3) a misapprehension of the facts, circumstances and conditions attendant upon the drawing of the agreement sued which led to a factual assumption which cannot be logically sustained.

Had this Honorable Court reversed the *Allemannia* case and declined to follow it, counsel for the respondent-petitioner, irrespective of their views as to the law, would have bowed in humble submission. It is respectfully submitted, however, that the express approval of the *Allemannia* case, in the opinion reversing the judgment in the instant case, presents an incongruity which cannot be reconciled and makes for an inexplicable enigma.

The decision of this Honorable Court, which cannot be altered, amended or recalled, save by the grace of this Court itself, deprives creditors of defunct insurance companies (including those whose policies have been reinsured) of millions of dollars, reverses a rule of law which has stood for centuries, throws the business of reinsurance into complete chaos, lengthens the course of liquidation of defunct insurance companies thereby increasing administration expense, and enriches reinsurers who are relieved from the payment of their obligations and permitted to retain the consideration for engagements which they need not now carry out.

If this petition is longer than it should be, the indulgence of this Honorable Court is sought, because of the importance of the question involved to the creditors of the defunct companies who suffer so greatly thereby, state insurance authorities who must now formulate new rules, the insurance companies which must now readjust their business, and to the insurance world in general.

First Specification of Error.

This Honorable Court, by reason of an inadvertent misquotation of the reinsurance agreement sued upon, erred in its application of the law. The opinion states:

> "The 1930 form provides 'the reinsurer does hereby reinsure against loss'. The *Allemannia* policy declared the company 'hereby agrees to reinsure'."

It is respectfully submitted that the 1930 form does not so provide; and that the quotation from the *Allemannia* policy is tantamount to excluding the word "not" from the quotation "I do not".

The 1930 form is similar to and almost identical with the language of reinsurance agreements which were construed as indemnity against liability and not as against loss **and were approved as such by this Court.**

In *Allemannia Fire Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, this Honorable Court cited with approval *Hone* v. *Mutual Safety Ins. Co.*, 2 N. Y. 235, wherein the Court of Appeals, *in the opinion*, quoted the language of the reinsurance agreement as follows (p. 243):

> "The words of the contract in this case are, 'The Mutual Safety Insurance Company, by this policy of insurance, in consideration of thirty-five dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, **do reinsure The American Mutual Insurance Company against loss** or damage by fire, to the amount of

> ten thousand dollars, on merchandise, hazardous or not hazardous, property of Hackenrath & Van Damme * * *", &c. (Emphasis ours.)

Another case cited by this Honorable Court with approval in the *Allemannia* case was *Consolidated Real Estate and Fire Ins. Co.* v. *Cashow*, 41 Md. 59, wherein the reinsurance agreement read:

> "Northwestern National Insurance Company of Milwaukee, Wisc., by this policy of insurance, in consideration of seventy dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, **do reinsure Fulton Fire Insurance Company, of New York, against loss** or damage by fire to the amount of five thousand dollars, on their insured interest under their policy No. 8212, issued to Simpson, Nowel & Co., on their stock of merchandise", &c. (Emphasis ours.)

Other cases relied upon by this Honorable Court in the *Allemannia* opinion contain similar language.

It is respectfully submitted that the words "against loss", in the cited cases placed thus *immediately after the name of the reinsured company,* would far more readily have justified a construction of indemnity against loss than the case at bar, where the words "against loss" follow not the name of the reinsured company, but the policy or bond which the reinsurance affects.

If it be urged that the words "against loss" in the cited cases are accompanied and followed by the words "or damage" and that they are therefore distinguishable, the contention is specious; for fire (the risk reinsured in those cases were fire losses or damage) may cause a total loss or partial loss or merely damage, whereas a fidelity bond envisages embezzlement as to which there can be loss only. Hence the language in the instant case is "against loss" and not "against loss or damage".

The 1930 form is less susceptible to a construction of indemnity against loss than is the Allemannia contract or the contracts in the cases therein cited with approval.

The 1930 form provides not that "the reinsurer does hereby reinsure against loss", but that "the REINSURER, does hereby reinsure FIDELITY AND DEPOSIT COMPANY OF MARYLAND, hereinafter called the REINSURED, under bond numbered....., together with all riders attached thereto, hereinafter called the BOND, issued by the Reinsured in the penalty of.....Dollars in favor of .....(obligee), and in behalf of ..... hereinafter called the Principal, against loss thereunder and against costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement" (R. 47, lines 2-10).

It will be observed that in the citations in the *Allemannia* case, the words "against loss" follow the name of the reinsured company, whereas, in the case at bar, the words "against loss" follow not the name of the reinsured company, but a description of the risk reinsured. It is respectfully submitted, that if the agreements in those cases so cited with approval by this Court, were held to be agreements for indemnity against liability and not against loss, the reason for so construing the agreement in the case at bar becomes overwhelming and the contrary ruling can only be ascribed to the misreading of the agreement sued upon.

Again, this Honorable Court, it is respectfully submitted, misread or overlooked vital language of the Allemannia agreement which gave infinitely more cause for construction of indemnity against loss than the instant agreement. In that case, the agreement did not merely "hereby agree to reinsure" but to reinsure **upon certain terms and conditions.** It read as follows:

> "* * * hereby agrees to reinsure the Firemen's Insurance Company of Baltimore, Maryland, under its policies * * * in such amounts, * * * as shall be entered in the book * * * **subject to and governed by the following terms, Conditions and Stipulations:"** (Emphasis ours.) (Appendix, p. 21, Petitioner's Brief.)

Just what were those "following terms, conditions and stipulations"? They are found, among others, under the heading **"Loss and Loss Expenses"** in subdivision 11 of the *Allemannia* contract as follows:

> "* * * losses, if any, shall be payable pro rata with, in the same manner, and upon the same terms and conditions **as paid by the said reinsured company** under its contracts hereunder reinsured, **and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid** to the assured * * * by the said reinsured company * * *." (Emphasis ours.) (Appendix, p. 25, Petitioner's Brief.)

The loss or damage referred to in the reinsurance agreement is the injury to the original property insured or the loss which the primitive assured suffers. It is not and never has been construed to be the loss of the reinsured (Brief, pp. 6-16). (*Provincial Insurance Company* v. *Aetna Insurance Company*, 16 Upper Canada, Q. B. 135.)

Second Specification of Error.

In the opinion, this Honorable Court, quoting that part of the 1930 form wherein appears the language that the reinsurer's proportionate share of the loss shall be paid to the reinsured upon proof of payment, stated that the Allemannia policy contained no equivalent terms and illustrated the point by quoting a provision of the Allemannia contract **which was never claimed to be the equivalent of the language of the standard form and was not relied upon by either of the Courts below or by the respondent.** This Honorable Court, it is respectfully submitted, overlooked the language **which was relied upon** and which furnishes an unequivocal and most compelling equivalent to the language of the 1930 standard form.

Such language appears not in subdivision 10 of the Allemannia contract, (which was quoted by this Honorable Court), but in subdivision 11 under the heading **"Losses and Loss Expenses"** and reads:

> "Each entry under this compact * * * shall be subject to the same conditions * * * as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured company under its contracts hereunder reinsured, **and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured * * * by the said reinsured company under its original contracts hereunder reinsured** * * *." (Emphasis ours.) (Appendix, p. 25, Petitioner's Brief.)

This is the language upon which respondent-petitioner relied as equivalent; and this Honorable Court in the *Allemannia* case interpreted that clause (p. 336):

> "We agree with the court below, that the language of the eleventh subdivision, taken in connection with the fact that it is used in a contract designated by the parties as one of reinsurance, means that the reinsuring company shall not pay more than its ratable proportion of the **actual liability payable** on the part of the reinsured, after deducting all liability of other reinsurers." (Emphasis ours.)

The contract in the instant case was "designated by the parties as one of reinsurance" and the language which follows, (quoted by this Court in the opinion), means **not payment** but the "actual liability payable". Subdivision 10 of the Allemannia contract, quoted in the opinion in the case at bar, was dismissed by this Honorable Court in the *Allemannia* case with the comment (p. 336):

> "Subdivision 10 of the contract does not result in any different conclusion."

In other words, the subdivision stressed in the instant case by this Honorable Court was brushed aside by this Court as of no consequence in the *Allemannia* case, whereas the subdivision relied upon by respondent-petitioner, and which cannot be distinguished from the clause in the instant case, was apparently overlooked.

Third Specification of Error.

The last reason given by this Honorable Court for a reversal was set forth as follows:

> "As the standard form of 1930 was adopted twenty years after the *Allemannia* case it fairly may be assumed that the dissimilar language employed was intended to impose liability different from the one there found to exist."

Previously in the opinion, the Court said:

> "* * * the liability under any written contract must be determined upon consideration of the words employed, read in the light of attending circumstances."

The latter rule of law cannot be disputed. It is respectfully submitted that this Honorable Court overlooked or misapprehended salient facts and circumstances and that "the light of attending circumstances" demonstrates conclusively that the agreement was intended to be one of indemnity against liability and not against loss.

The authorities cited by the respondent in the brief heretofore submitted, disclose that the words "payment", "paid", "payable", "actually paid", "reinsure" and similar language used in connection with reinsurance contracts are and always have been regarded in the insurance world not as a requirement for actual payment, **but as liability for payment.**

The standard form was adopted not in 1930, "twenty years after the Allemannia case", **but in 1915,** seven years

after the *Allemannia* case; **for the language of the 1930 agreement, relied upon by this Court in the construction thereof, is precisely the same as that used in the standard form of 1915** (R. 47, 49; Brief, pp. 18, 19), which was squarely construed by the Supreme Court of Iowa in 1923 as indemnity against liability *not as dictum*, but as the law of the case. *Globe National Fire Insurance Co.* v. *American Bonding and Cas. Co.*, 198 Iowa 1072.

And in the face of this decision, such standard form was redrawn seven years later with the selfsame language which the Iowa Court had ruled constituted an agreement of indemnity against liability and not against loss.

These then are the "attending circumstances". Summarized, they are: a well settled rule of law, the use of language always construed as indemnity against liability in reinsurance, the decision of the highest Court of a state construing the precise language as indemnity against liability, and the decision of this Honorable Court interpreting language more susceptible to the construction contended for by the reinsurer, as indemnity against liability.

The interpretation sought by respondent-petitioner is fortified even further by the use of language in the 1930 standard form which would be utterly absurd if the agreement were not one of indemnity against liability. Such verbiage would have no place in the agreement unless it *was* one of indemnity against liability and not loss (R. 47, lines 136-151, 62-65; Brief, p. 23).

It is respectfully submitted that such facts and circumstances warrant the assumption, not that the draftsmen of the 1930 standard form intended to deviate from the universal rule as reiterated in the *Allemannia* case, but that they intended to follow that well settled rule which had been reiterated in every reported case, text, authority and article. If, as contended by the reinsurer in its brief, there was no warrant for an assumption that the draftsmen knew of the Iowa case or the *Allemannia* case, it is earnestly submitted that there is

definitely less warrant for the assumption that with knowledge of the *Allemannia* case, they used dissimilar language with an intent to deviate from the rule of law therein reiterated, although that dissimilar language cannot be distinguished from the *Allemannia* language and was the precise language construed by the Supreme Court of Iowa as indemnity against liability.

An intention to depart from a well settled rule of law must be based not upon an assumption but upon an express stipulation. In *Consolidated Real Estate and Fire Insurance Company* v. *Cashow*, 41 Md. 59, approved by this Honorable Court in the *Allemannia* case, the Court, after referring to the nature of a reinsurance contract as being one of indemnity against liability and not loss, said (p. 75):

> "This being the unquestioned law of such contracts generally, the question is, have the parties modified it by any *express stipulation* of the policy in suit?" (Italics ours.)

And in a reinsurance contract which provided among other things that the liability of the reinsurer was limited to actual compensation to employees, the Court, in *Republic Metal Ware Co.* v. *General Reinsurance Corp.*, 245 A. D. 232 (N. Y.), after enunciating the law of reinsurance as being one of indemnity against liability and not against loss, said (p. 237):

> "To permit a construction of such a contract, so as to confine its obligations to an indemnity for obligations discharged by payment, *such must clearly and unequivocally appear to have been intended upon the terms of the instrument of reinsurance itself.*" (Italics ours.)

Neither an express stipulation nor unequivocal terms tending to permit of any construction other than indemnity for liability appear in the 1930 form or 1915 form.

It is fair to ask what was intended to be accomplished by the 1930 standard form.

> "Commercial agreements must be interpreted in the light of commercial usages, of reason and of justice. It must be presumed that the intention of the parties to them, regarding their performance as well as their terms, is reasonable, fair and practicable."
>
> *Kauffman* v. *Raeder*, 108 Fed. 171, 185-186 (C. C. A. 8th Circuit, Mo.).

"*In the light of commercial usages*", the agreement in the case at bar must be interpreted as one of indemnity against liability. That has always been and still is the accepted practice and usage, not only in intercompany transactions, but uniformly in various state insurance department examinations, where reinsurance is admitted as a credit to nullify liability on a primitive risk and erase required reserves.

"*In the light of reason*", it must also be so interpreted, in that the reinsured company by reinsuring its risks was endeavoring to protect policyholders and forestall insolvency which might ensue by it being compelled to maintain reserves for the entire unearned premiums and pay full losses, or a temporary insolvency which might ensue between payment of a loss by it and collection of reinsurance.

"*In the light of justice*", it must also be so read, in that the consideration which the reinsurer received was in no way effected by the misfortune of the reinsurer, the reinsurer suffered no prejudice thereby and was, moreover, permitted to retain moneys paid to it out of premiums received by the reinsured which constitute a trust fund for the payment of losses of policyholders (*Scoville* v. *Thayer*, 105 U. S. 143; *Mygatt* v. *N. Y. Protection Insurance Co.*, 21 N. Y. 52, 59). The use of the premiums for

such a purpose has been approved only because it gives a greater security for that purpose.

That is the "reasonable, fair and practicable" construction of the 1930 reinsurance agreement and the intention of the parties, in the light of commercial usage, reason and justice, which in the light of attending circumstances "must prevail over the dry words of the stipulation". (*Kauffman* v. *Raeder*, 108 Fed. 171, 175.)

The "honorable engagement rather than as a mere legal obligation", which expressly characterizes the 1930 form (R. 47, lines 185-187), is made a hollow mockery, if reinsurers may take advantage of the misfortune of the reinsured, which injures such reinsurer not one whit, and deprive creditors of the reinsured of the fruits of the reinsurance contract entered into for their benefit and at their expense, whilst the reinsurer retains the consideration therefor.

Conclusion.

The staggering blow which this decision has dealt the reinsurance business, the subversion of the rule of law inherent in reinsurance contracts as it has obtained through the centuries, the millions of dollars of which the creditors of defunct companies are being deprived, the unjust enrichment of reinsurers, together with all other reasons hereinbefore set forth, make out, it is submitted, a strong case for a reconsideration. Surely before such a rule of law, which has stood for centuries and has been the beacon of the reinsurance business, is overruled and reversed, and millions of dollars taken thereby from creditors whose security in premium reserves was depleted by exchanging the same for a greater security in the way of a reinsurance contract, consideration should be given of the issues in this case and if, perchance, this Honorable Court feels further proof is necessary with respect to any matter in issue in the lower

Court, it may be so ordered, to the end that justice may not be thwarted.

WHEREFORE on all the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the lower Courts be, upon further consideration, affirmed.

Respectfully submitted,

ALFRED C. BENNETT,
IRVIN WALDMAN,
Counsel for Respondent-Petitioner.

Certificate of Counsel.

I, IRVIN WALDMAN, counsel for the above-named respondent-petitioner, Louis H. Pink, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated, December 15, 1937.

IRVIN WALDMAN,
Counsel for Respondent-Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1937.

Fidelity & Deposit Company of Maryland, Petitioner, *vs.* Louis H. Pink, Superintendent of Insurance of the State of New York, etc.	Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 6, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

In 1930 Southern Surety Company, a New York corporation, issued to John DeMartini Co., Inc., a fidelity insurance bond and on the same day reinsured half of the risk with petitioner, Fidelity & Deposit Company of Maryland. The DeMartini Co. claimed a loss. While this was in course of adjustment (March, 1932), a New York court adjudged the Southern Company insolvent and dissolved it. Respondent Pink, Superintendent of Insurance for New York, took possession of its property and entered upon liquidation of the business.

He allowed but did not discharge the DeMartini Company's claim. Thereupon he demanded that petitioner pay half of it. This having been refused he instituted these proceedings in the United States District Court to recover upon the reinsurance contract. Judgment went in his favor; the Circuit Court of Appeals affirmed; the matter is here upon certiorari. The facts are not in dispute.

The contract between the two insurance companies incorporated the "standard form of reinsurance agreement" adopted by the Surety Association of America in 1930. This form provides —

"In consideration of the premium payable under section 1 hereof ..... hereinafter called the Reinsurer, does hereby reinsure Fidelity & Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered ....., together with all riders attached thereto, hereinafter called the Bond, issued by the Reinsured in the penalty of ..... Dollars, in favor of ..... (obligee), and in behalf of ..... hereinafter called the Principal, against loss thereunder and against

costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement.

"The foregoing agreement is subject to the following conditions and provisions:". (These appear in fifteen succeeding sections.)

Section 4, copied in the margin,[1] contains the following, among other things—

"The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond."

Petitioner's counsel maintain that the standard form provides for insurance only "against loss"; that the reinsurer thereunder becomes liable only upon "proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof"; that payment by the reinsured is a condition precedent to the reinsurer's liability. Sundry provisions in the form, indicated below, they say lend support to this view.[1]

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[1] Introduction—"Does hereby reinsure . . . . against loss".
Section 3—

"3. Unless otherwise expressly agreed, the amount of liability retained by the Reinsured at its own risk both when this agreement is made and at the time of any breach of the bond resulting in a claim thereunder shall be:

"(a) If the bond be other than a depository bond or blanket bond, in no event less than the amount ceded hereunder, such retention to be carried under the bond; or

"(b) If the bond be a depository bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to the Reinsurer under any other depository bond or bonds issued by the Reinsurer in behalf of the Principal and effective at the time of any breach of the bond resulting in a claim thereunder, such retention to be carried under any depository bond or bonds issued and/or any depository reinsurance or reinsurances carried by the Reinsured in behalf of the Principal; or

"(c) If the bond be a blanket bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to

Respondent maintains that proof of payment is not a prerequisite to recovery.

Both courts below thought that *Allemannia Insurance Company* v. *Fireman's Insurance Company*, 209 U. S. 326 (1908), required approval of respondent's contention. This was error. The defense was well taken and should have been sustained.

We do not question the general rules concerning liability of reinsurers announced in the *Allemannia* case; but the liability under any written contract must be determined upon consideration of the words employed, read in the light of attending circumstances.

Here the two insurance companies stood upon an equal footing; both were experts in the field. The language used differs materially from that found in the policy of the Allemannia Company. There is no ambiguity and no circumstance requires disregard of the ordinary meaning of the language.

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the Reinsurer under any other blanket bond or bonds issued by the Reinsured in favor of the same insured and effective at the time of any breach of the bond resulting in a claim thereunder; such retention to be carried under any blanket bond or bonds issued and/or any blanket bond reinsurance or reinsurances carried by the Reinsured in favor of the same insured. The actual retained liability of the Reinsured as aforesaid shall not be more than that ceded to the Reinsurer, whether it be primary or excess or partly primary and partly excess. . . ."

Section 4—

"The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond.

"The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

"The term costs and expenses shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; and all expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond."

Section 10—

"The Reinsurer shall be entitled to share with the Reinsured, in the proportion defined in section 2 hereof, any collateral security or indemnity held by the Reinsured. . . ."

The 1930 form provides, "The Reinsurer does hereby reinsure against loss." The Allemannia policy declared the company "hereby agrees to reinsure."

Petitioner's policy says—"The reinsurer's proportionate share of the loss . . . shall be paid to the reinsured upon proof of the payment of such items by the reinsured and upon the delivery to the reinsurer of copies of all essential documents concerned with such loss and the payment thereof." The Allemannia policy contained no equivalent terms. It provided—"Upon receiving notice of any loss or claim under any contract hereunder reinsured, the said reinsured company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, of the same, and of the date and probable amount of loss or damage, and after said reinsured company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, a proof of its loss and claim against this company upon blanks furnished for that purpose by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; . . . ."

As the standard form of 1930 was adopted twenty years after the *Allemannia* case it fairly may be assumed that the dissimilar language employed was intended to impose liability different from the one there found to exist.

The judgment below must be reversed. The cause will be remanded for further proceedings.

Reversed.

The CHIEF Justice took no part in the consideration or decision of this cause.

A true copy.

Test:

Clerk, Supreme Court, U. S.